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PROCEEDINGS AND ORDERS

DATE: 050385

CASE NBR 84-1-05819 CSY
SHORT TITLE Boyd, Arthur M.
VERSUS North Carolina

DOCKETED: Nov 26 1984

Date	Proceedings and Orders
Oct 15 1984	Application for extension of time to file petition and order granting same until November 26, 1984 (Chief Justice, October 19, 1984).
Nov 26 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Dec 13 1984	Brief of respondent North Carolina in opposition filed.
Dec 20 1984	DISTRIBUTED. January 11, 1985
Dec 21 1984	Reply brief of petitioner Arthur M. Boyd filed.
Jan 14 1985	REDISTRIBUTED. January 18, 1985
Jan 14 1985	Record requested.
Jan 28 1985	Record filed.
Jan 28 1985	Certified copy of C.A. proceedings, 9 Volumes.
Feb 1 1985	REDISTRIBUTED. February 15, 1985
Feb 19 1985	REDISTRIBUTED. February 22, 1985
Feb 25 1985	REDISTRIBUTED. March 1, 1985

CONTINUE {

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Mar 11 1985	REDISTRIBUTED. March 15, 1985
Mar 18 1985	REDISTRIBUTED. March 22, 1985
Mar 25 1985	REDISTRIBUTED. March 29, 1985
Apr 5 1985	REDISTRIBUTED. April 12, 1985
Apr 15 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

EDITOR'S NOTE

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ORIGINAL

No. 84-5819

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

RECEIVED
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SUPREME COURT, U.S.

ARTHUR MARTIN BOYD, JR.

Petitioner,

-v-

THE STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTIONS PRESENTED

1. Whether the judge at the sentencing phase of a capital trial for a domestic homicide may constitutionally preclude the jury from hearing the only expert testimony proffered by the defendant in mitigation concerning his unhappy family background, his psychological history and emotional state at the time of the offense, and the consistency of those factors with the profile of domestic homicide offenders who do not pose a continuing threat to the public?

2. Whether the trial court may constitutionally excuse two prospective jurors for cause at a capital trial, without permitting any defense questioning, based on the jurors' vacillating and equivocal answers to a series of misleading questions concerning their views on the death penalty?

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No. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ARTHUR MARTIN BOYD, JR.

Petitioner,

-v-

THE STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner, ARTHUR MARTIN BOYD, JR., respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of North Carolina on August 28, 1984, affirming Mr. Boyd's sentence of death.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 319 S.E.2d 189 (N.C. 1984). It is set out in Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The judgment of the Supreme Court of North Carolina was entered on August 28, 1984. On October 19, 1984, Chief Justice Burger signed an Order Extending Time to File Petition for Writ of Certiorari until November 26, 1984. A copy of that Order is set out in Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

This case also involves sections 14-17 and 15A-2000 of the General Statutes of North Carolina, which are set out in Appendices C and D, respectively.

STATEMENT OF THE CASE

On Saturday afternoon August 7, 1982, petitioner and his recently estranged girlfriend, Wanda Mae Hartman, attended a car wash run by members of their church. In plain view of numerous people who knew both of them, Mr. Boyd repeatedly stabbed Ms. Hartman with a knife, killing her.

A Surry County, North Carolina jury convicted Mr. Boyd of first-degree premeditated murder; on March 22, 1983, it reached a verdict of death. T.R. 55.[1] The Supreme Court of North Carolina affirmed, two justices dissenting on the ground that the trial judge excluded critical evidence proffered in mitigation of the death penalty by Mr. Boyd. App. A.

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[1] "T." refers to pages in the trial transcript, "M.T." to pages in the transcript of the pretrial motions hearings; "T.R." to pages in the technical record; "D.X." to defendant's trial exhibits; and "D.M.X." to defendant's exhibits at the motions hearings.

Because Mr. Boyd's background, propensities, and emotional state at the time of the killing -- and what the jury was and was not permitted to hear about those circumstances -- are critical to the first Question Presented, a detailed statement of facts and proceedings is set out below.

A. Statement of Facts

Mr. Boyd (then 33) and Ms. Hartman (then 29) met in late 1978. They moved in together within a few days, and from then until April 1982, lived together in a "well-kept house ... [in a] calm, ordinary-type family situation," attending church together, raising Ms. Hartman's little girl, entertaining fellow church members in their home, and in other respects acting as a married couple. T. 626, 678-79, 690, 1002-04, 1034, 1084, 1183, 1189.

Mr. Boyd described his relationship with Ms. Hartman as the "best thing that ever happened to me." Their period together was apparently the only time during the preceding 15 years when Mr. Boyd was living in a stable domestic situation free of the alcohol and drug abuse which had otherwise plagued his entire adult life.[2] T. 1003-06, 1034, 1039, 1155, 1174, 1078-71, 1182-83, 1189.

In April 1982, Mr. Boyd discovered that Ms. Hartman was "dating" two other men while living with him. "[V]ery upset," he confronted her with this fact, following which Ms. Hartman moved out of their home and in with her parents. T. 1036, 1050-51, 1154, 1159.

Over the next several months, Mr. Boyd did "everything in [his] power ... to get Wanda Hartman to come back." He "begged and pleaded with her" on the telephone and in visits to her parents' home and at church; and he "laid [his] heart out to her every way [he] knew how" to find some "way ... she maybe

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[2] According to his probation officer, Mr. Boyd's "problems ... all stemmed from alcohol." T. 1181. During most of the period when he lived with Ms. Hartman, Mr. Boyd took "anti-abuse" pills on a daily basis in front of a local magistrate, in order to curb his desire for alcohol, and, he testified, "to please" Wanda Hartman. T. 1006-07, 1182.

would ... consider[] coming back and us getting married. But it didn't work." T. 1022, 1027, 1036, 1010; see T. 684, 700, 1029, 1084, 1169, 1184.

At first, Ms. Hartman continued to visit Mr. Boyd in their home, and "would always leave [petitioner] like this: 'maybe, maybe something will work out sometime.'" T. 1036. In late July, however, Ms. Hartman told petitioner that she was "involved ... with some other men" and "didn't want to see him anymore." Her father for the first time ordered Mr. Boyd "to get off [his] property and stay off" and swore out a trespassing warrant against petitioner. T. 683, 1010-11, 1015, 1184. On this occasion, for the first and apparently only time prior to the murder, petitioner threatened Ms. Hartman. T. 683-85.

According to his probation officer, Mr. Boyd's already chronic "concern about how [badly] his life had gone" up to that point became "intensified" following his estrangement from Wanda Hartman; he became "more worried and introspective." T. 1184. Petitioner himself testified that he was "upset," that he "couldn't sleep," and "that he was having thoughts about ... killing Wanda ... killing myself." T. 1011, 1013, 1053. Mr. Boyd sought the advice of a number of people concerning Ms. Hartman's rejection of him, including his probation officer, a lawyer he briefly consulted on the trespassing charges, his former wife, and a local mental health organization to which his ex-wife referred him, telling them, in the lawyer's words, "that he didn't know whether or not he could live without her." T. 1012-14, 1084, 1184. Also during this period, Mr. Boyd once again "got heavy on" drugs and alcohol and was arrested on drunk driving charges. T. 1012-13, 1083-84, 1182-83.

On August 5, 1982, at 6:45 p.m., Mr. Boyd took his last daily "anti-[alcohol-]abuse" pill prior to the murder. T. 1182; see n.2 supra. That night, Mr. Boyd worked at a construction job from approximately 10:00 p.m. until 8:00 a.m. Friday morning,

"doing speed [and] smoking pot all night." T. 1014. The next morning after a bath, he "went to town, started drinking" and consumed more "speed and ... pot." T. 1014.

Late that afternoon, Mr. Boyd appeared without an appointment at the office of a local lawyer whom he sought to retain in connection with his trespassing and drunk-driving charges. Although the lawyer refused the case, Mr. Boyd sought his personal advice concerning his estrangement from Ms. Hartman. According to the lawyer, Mr. Boyd appeared to be "under the influence of drugs or the lingering influence of drugs, as though he had had a great many drugs to ingest the day or night before." T. 1082-83, 1015-16.

Friday night, Mr. Boyd again worked the "midnight shift." T. 597, 1044. At 8:00 a.m. Saturday morning, he telephoned Ms. Hartman to ask her, for the last time, "to come back." She told him again that she was involved with other men and that he too should "date other people and try to forget things." T. 1016-17. During the conversation, Ms. Hartman told Mr. Boyd that the church they both attended was holding a fund-raising car wash at the Mayberry Mall that day. T. 1018.

Thereafter, Mr. Boyd went to a local tavern, where, over the course of two to three hours, he consumed nearly a pint of whiskey, several glasses of beer, some marijuana and possibly two or three large black capsules, described as "crank," a type of "speed." T. 778-87, 795-804, 820-25, 839-44. At this point, Mr. Boyd had had no more than four hours sleep during the preceding forty hours. Around 12:30 p.m., Mr. Boyd asked the bartender for another glass of beer, but she "cut him off," telling him "you don't need any more. You have had enough. Call a cab and go home." T. 843.[3]

[3] The bartender knew Mr. Boyd and had seen him drunk before. According to her, "when [Mr. Boyd is] drunk he walks on his toes" and he "was ... toe walking that day." T. 838, 844, 851.

After briefly attempting to reach someone by phone, Mr. Boyd "slammed the phone down," and walked out. Later that afternoon, he took a taxi to the Mayberry Mall. T. 588-90. Around 2:00 p.m., Mr. Boyd went into a store in the Mall which displayed knives in the window and bought a lock-blade pocket knife. T. 594.

A half hour or more before, Wanda Hartman and her mother had arrived at the Mall and gone into the K-Mart on a shopping trip. As they were checking out, Ms. Hartman pointed out Mr. Boyd, also inside the store. Mr. Boyd joined them, and Ms. Hartman agreed to let him walk then to the car wash, which was being held in the parking lot near a bank. T. 1020-21. At the car wash, Mr. Boyd spoke to a number of people he knew from church, as well as Ms. Hartman's father and daughter Laura. Mr. Boyd sat down on a curb next to one of the parishioners, and his ex-girlfriend sat down beside him. The couple conversed quietly about "get[ting] back together," until Ms. Hartman's mother told her that they "had to go home ... to wash our hair." T. 614-17, 619, 630, 644, 665-66, 671-75, 682, 693, 695, 1022.

Ms. Hartman stood up to leave; Mr. Boyd repeatedly asked her to "just give me two or three more minutes;" her mother told him to "go on and leave her alone, she don't want to talk to you;" finally, Ms. Hartman "looked [petitioner] in the eye and said, 'if you are going to kill me, kill me and hurry up and get it over with.'" T. 620, 666, 674, 680. Mr. Boyd put his hand on Ms. Hartman's shoulder and pulled the knife out of his pocket. She told him to put the knife away; he said "Honey, I ain't going to hurt you with this knife;" when she continued moving away to leave, he knocked her down with a single overhand stabbing motion, then fell upon her as she lay on the ground, grabbed her by the hair and "stabbed her and beat her ... over and over," inflicting 37 wounds on her torso, upper legs and hands. T. 620-22, 642, 674.

Mr. Boyd stood up, backed slowly away from Ms. Hartman's father, who had just then returned from the restroom, then went slowly away across the parking lot, removing his blood-stained shirt as he walked. A couple minutes later, he was approached by two policemen as he ducked between two cars. After "struggling" briefly, he was subdued and arrested. The knife was recovered under one of the cars. T. 634-35, 654-59, 702-08, 711-14. The officer who subdued him noticed an odor of alcohol about Mr. Boyd. T. 719.[4]

Ms. Hartman remained conscious and in pain until she died an hour and a half later in an ambulance traveling between two hospitals. T. 752, 755.

B. Pretrial Proceedings

After his arrest, Mr. Boyd was adjudged indigent and counsel was appointed. Upon motion of counsel, he was twice committed to a state psychiatric institution, first for a competency examination and second for E.E.G. and "Halstead-Reitan" tests. T.R. 2-4, 27-28. A state psychiatrist found Mr. Boyd competent to stand trial. M.T. 4-5.

Defense counsel also moved the court to appoint a local psychiatrist to "tell us whether or not there are any mitigating circumstances in this particular case that might be used at the sentencing phase." M.T. 4; T.R. 16-17, 22. The psychiatrist was an "expert in the field of acute emergency psychiatry which deals with psychoses and violent behavior in individuals" and averred that his fee, including testimony, would not exceed $400.

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[4] A number of prosecution witnesses testified that Mr. Boyd did not "appear" to be drunk that afternoon. T. 600, 603, 646, 677, 686, 703, 708, 719, 727, 736, 739. No alcohol or drug tests were performed on petitioner at the time of his arrest, and the police waited 24 hours after his arrest before photographing and questioning him. T. 719, 729-30, 739.

Mr. Boyd testified that he does not remember many of the events of August 7, 1982, following his consumption of drugs and alcohol in the morning; he recollects purchasing the knife, sitting on the curb and talking with Wanda Hartman about a reconciliation, her mother calling her away, her refusing his pleas for "more time to talk," and his stabbing her once with an overhand gesture while both were standing up. T. 1020-23.

Concluding that "there is no basis in the [psychiatrist's] affidavit to think that he would be able to come to any better opinion than" the state psychiatrist who examined petitioner, the motions judge denied the motion. M.T. 4, 7-9, 22; T. R. 16-17, 22.

During jury selection, 40 percent of the venire (29 jurors) were struck for cause because of religious or conscientious scruples against the death penalty. T. 14-16, 18-19, 21-26, 28-31, 35-36, 120-23, 266, 268-69, 271-72, 274-75, 344-47, 350-53, 376-81, 458-59, 510-19, 528-29. The prosecutors conducted all of the "death qualification" voir dire, asking each juror in the presence of the others a repeated series of leading questions which equated conscientious scruples against the death penalty with a refusal to impose that penalty even when the law requires it. E.g., T. 20, 120, 267. Two prospective jurors, Garland Smith and James Arrington, who repeatedly vacillated on the question whether they could impose the death penalty "in this particular case," were struck for cause over defense objection, though neither unequivocally said that he could not impose the death penalty. Defense counsel's requests to question the two vacillating jurors were denied. T. 23-26, 518-16. The voir dire of prospective jurors Smith and Arrington are set out in Appendices G and H, respectively.

C. Trial Proceedings

1. Guilt phase

At the guilt phase of trial, the defense informed the jury in opening argument that Mr. Boyd admitted stabbing his former girlfriend to death, and confined its evidence and closing argument to Mr. Boyd's drug and alcohol consumption on the morning and early afternoon of August 7, 1982, as it bore on the issue of premeditation. T. 577-78, 777-852., as it bore on the

In the State's closing arguments at the guilt phase, both prosecutors emphasized the danger Mr. Boyd assertedly would pose to "the community" in the future if he was not convicted of first degree murder. The jurors were told that they "ow[ed] it to [them]selves," to "the people in this County" and "to North Carolina life" to convict Mr. Boyd of first degree murder -- in order that he not be "unleashed on the County" in the future to "roam around ... slicing and ravishing and having his way."[5]

The jury convicted Mr. Boyd of first degree murder. T. 981.

2. Evidence heard at the capital-sentencing phase

After being released for the weekend, the jury returned to hear evidence offered in aggravation and mitigation. T. 997, 1317. In addition to its evidence at the guilt phase, the State's case in aggravation consisted of Mr. Boyd's stipulation that he was convicted on January 15, 1963 of assault with intent to commit rape.[6]

In mitigation, Mr. Boyd sought to present lay and expert testimony concerning (1) his childhood and family background, (2) his relationship with Wanda Hartman and the effect on him of their estrangement in the weeks preceding the offense, and (3) his prospects for nonviolent behavior in the future. The jury was permitted to hear the lay testimony, described in this section; but the trial court excluded the expert testimony, which is summarized in the next section.

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5 T. 900, 926, 929-30, 942, 945; see App. A, 319 S.E.2d at 196. As described by the North Carolina Supreme Court, "[t]he prosecutor then went on to ask how the jury would respond to the witnesses, the paramedics, the victim, her parents, and her daughter if the verdict was for less than first degree murder." Id. The North Carolina Supreme Court disapproved this argument, but held the error "not prejudicial" because of "ample" evidence in the record supporting petitioner's conviction. App. A, 319 S.E.2d at 193, 196.

6 T. 996-97, 1000-01. This 20-year-old conviction, rendered while Mr. Boyd was a juvenile, was his only prior violent felony. He was subsequently convicted of theft, nonsupport and a number of infractions growing out of his alcohol abuse. T. 1070-72.

With regard to Mr. Boyd's childhood and family background, essentially the only evidence which the jury heard was his mother's brief and inarticulate testimony.[7] According to Mrs. Boyd, her husband, Arthur Martin Boyd, Sr., "had a hole blowed in his bronchial tubes" in World War II, which "never healed." T. 1088-89. She testified that when petitioner was a small child

> they was a rock in the front yard and Jap [petitioner's nickname] would sit on his rock and wait for his daddy to come and get off the bus. He loved him.

T. 1091.

When petitioner was three years old, Mr. Boyd, Sr. walked out on his wife and child; petitioner did not see his father again until nine years later, when Arthur Martin, Sr., by then "drink[ing] whiskey like water," returned with another woman and their children and divorced Mrs. Boyd. T. 1089.

Mrs. Boyd took her son to her parents' home, where she supported and kept house not only for petitioner but also for his grandparents and two uncles. T. 1091, 1094. Petitioner became exceedingly attached to his grandfather, but the old man died when petitioner was five. Asked the effect of his grandfather's death on Mr. Boyd, his mother testified:

> A. He had to go under a psychiatrist, and they said that he was, it would be just like this, that the youngun had lost his daddy that he loved and his grandfather that he had loved and that it would be just like a man having a dog and that the dog was grieving itself to death because, the dog would, said that the youngun was just like that because, said --
>
> Q. Because the master had died?
>
> A. Yeah, said that the child was a grieving just like a dog would grieve when his master died, you know, that --
>
> Q. Okay. All right. Mrs. Boyd, thank you, ma'am. The District Attorney may have some questions for you.

T. 1092

The testimony of a lawyer, a probation officer, and Mr. Boyd himself was the only evidence the jury heard concerning petitioner's relationship with Wanda Hartman and the period immediately preceding August 7, 1982. The lawyer's testimony was based on a single, brief conversation with Mr. Boyd concerning trespassing and "DWI" charges pending against him; the parole officer's testimony was based on occasional conversations with Mr. Boyd and visits to his home. T. 1002-22, 1081-85, 1161-65.

With regard to Mr. Boyd's current behavior and future prospects, the jury heard only his own and six ministers' testimony concerning his post-August 7, 1982, religious conversion, his release from jail while awaiting trial so that he could be baptized at "Holder's Bottom," his remorse over the victim's death, and his attempts via letter and the intercession of a minister to seek forgiveness from his girlfriend's parents. T. 1025-29, 1144-80.

3. Evidence excluded at the capital-sentencing phase

The local psychiatrist, whose $400 fee the court had previously refused to authorize, did not testify. Instead, expressly to expand and tie together all the other evidence the defense presented in mitigation and to discuss Mr. Boyd's lack of a propensity for violence in the future, the defense attempted to present the testimony of Dr. John A. Humphrey, a tenured sociologist and criminologist at the University of North Carolina at Greensboro. T. 1138-39. The following facts about Dr. Humphrey's expertise and conclusions were established by proffer, outside the hearing of the jury, after the prosecutor objected to his

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7 T. 1286-94. Apart from some one- or two- word answers to leading questions, Mrs. Boyd's testimony is extremely difficult to decipher. E.g., T. 1090-91, 1093-94. Other than his mother and a 93-year-old grandmother, Mr. Boyd had no living relatives familiar with his childhood and background. His father died in 1978. T. 1987-88, 1092.

Mr. Boyd also briefly testified about his childhood, but gave few details about the critical events, all of which occurred when he was very young. T. 1029-31.

testifying in mitigation. Dr. Humphrey's proffered testimony (T. 1095-144) and his Curriculum Vita (D.X. 2) are attached as Appendices E and F, respectively.

Dr. Humphrey had spent most of the prior ten years conducting empirical studies in conjunction with the Chief Medical Examiner of North Carolina on the characteristics of offenders involved in violent homicide in that State. App. E, 1095-1144; App. F. Over the preceding 15 years, he had written over 50 books, articles and papers on the causes of homicide, and the characteristics of and relationships between different types of people who commit and are victimized by that crime.[8]

Most recently, culminating in 1981, Dr. Humphrey conducted an extensive statistical study of 1000 offenders in North Carolina's penal system, based on a careful examination and cross-check of detailed background and psychological information in their Department of Corrections Files.[9] Part of this study consisted of a comparison of the psychological histories of two randomly selected subgroups of nearly 300 homicide offenders -- those who killed persons with whom they had close personal ties and those who killed strangers. Dr. Humphrey's goals were to determine "why people [in North Carolina] carry out violent acts" and, in particular, what psychological pressures cause some

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8 App. E, 1098-1101; App. F, 2-7. In particular, Dr. Humphrey has written on the characteristics of homicide offenders, the role in homicides of personal relationships between offender and victim and the characteristics of violent offenders who do and do not commit crimes against loved ones; the relationship between homicide and suicide; the characteristics of, types of crimes committed by, and propensities for further violence of different types of violent and nonviolent offenders, including sociopathic, nonsociopathic and domestic homicide offenders; the relationship between alcohol use and deviate behavior; and the bearing of "loss" and psychological "stress" on the types of crimes homicide offenders commit and on their propensity for future violence.

9 App. E, 1101-43, 1113-4, 1118-20, 1133. Dr. Humphrey testified that the sampling, data-gathering, data-verification, and statistical methodology used in the study, as well as the strictly "objective kinds of information" analyzed, are "generally accepted in [his] field;" followed the "classical experimental design;" and were reviewed and approved by "one of the leading figures in homicide research in the United States." App. E, 1100-01, 1110-13, 1118, 1122, 1131. His methodology is described in detail in App. E, 1100-05, 1110-22, 1132-33.

people to commit violence against the persons "they fear losing the most;" whether there are background characteristics and personality traits which distinguish offenders who commit violence against loved ones from those who commit violence "indiscriminately" against "the public" at large; and, if so, what predictions can be made based on those characteristics and traits with regard to different offenders' propensities for violence in the future. App. E, 1101-06, 1109-22.[10]

Prior to testifying, Dr. Humphrey interviewed Mr. Boyd for an hour and a half and gathered information on petitioner's childhood, family history, background and psychological make-up. App. E, 1106, 1128-30.

Based on all of this research, Dr. Humphrey proffered the following conclusions:

1. An examination of Mr. Boyd revealed a "very confused individual" and a "life which seemed ... [at] the very least chaotic." App. E., 1107, 1134. Most particularly, "the one predominant factor [in Mr. Boyd's life] seemed to be repeated losses," including "the first thing he could remember ... [at] the earliest age he could think of," i.e., the death of his grandfather at the age of five:

> I asked him ... [w]hat after that do you remember? And as we talked he related his life which seemed to involve an inordinate amount of losing things, losing his father, losing his grandfather. He didn't have very many friends, and those he had he kept losing them. As his life progressed he lost his

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10 Some of Dr. Humphrey's findings from this research are reflected in an unpublished paper entitled "Stressful Life Events and Criminal Homicide," a draft of part of his study of 1000 inmates. D.X. 1. Defense counsel furnished the State with a copy of this report for cross-examination purposes, but emphasized that he was "not offering [the report] to the jury" and intended instead to present Dr. Humphrey's far more detailed and conclusive oral testimony concerning not only this research but also the various other sources he relied upon in reaching conclusions about Mr. Boyd. After the court ruled Dr. Humphrey's testimony inadmissible, defense counsel asked that the report "get into the record so the [Supreme] Court can look at it," but repeated that he had not intended to "offer it to the jury." App. E, 1102-03, 1129, 1141-43.

> liberty.... [T]he one predominant factor seemed to be repeated losses, an accumulation of these things.

App. E, 1107.

2. The loss of loved ones or of other things dear to a person can cause "chronic" psychological "stress." In contrast to "stranger killers," persons who commit domestic or other loved-one homicides often experience such stress in their lives prior to committing homicide. Such "loss" and "stress" frequently result in depression -- i.e., "anger turned inward" -- which, if extreme, emerges as self-destructive tendencies. In their most extreme form, such loss- and stress- induced "anger turned inward" and self-destructive impulses "precipitate or lead [either] to suicide" or to some other "self-destructive act," including killing a family member or close friend:

> The more loss in someone's life, the more likely they are to become self-destructive.... [K]illing a family member or killing a close friend is an act of self-destruction. They are, after all, killing something that is part of them, very close to them, very important to their self.

App. E, 1106, 1109 (emphasis added).

3. The traumatic background characteristics typifing extreme cases, in which an "accumulation of loss" leads people to "self-destructive" violence against themselves or their loved ones, are "especially true of Mr. Boyd." App. E, 1108 (emphasis added).

4. Superimposed on this background of "repeated losses" was the "loss" in the weeks immediately preceding the killing of "the most important thing [petitioner] had at the moment: this relationship with his girlfriend." App. E, 1107. In Dr. Humphrey's view, the "depression" brought on by this final loss of someone dear "precipitated" the self-destructive impulse which eventually led petitioner, as much out of malice toward himself

as towards her, to kill his paramour.[11] According to Dr. Humphrey, people like petitioner, who are chronically afflicted with loss and who once again

> are threatened with loss, and mainly these are losses of someone very close to them, wife, girlfriend, ... become depressed, very commonly depressed, and depression is in a sense anger turned toward yourself. Now, at that point [they] react either toward themselves totally or they will react outwardly and inwardly at the same time ... kill[ing] ... the person closest to them. And it is that person that is unfortunately in harm's way. And having extended that aggression toward other people they are in fact aggressing toward themselves. They are destroying that which they fear losing the most ..., a desperately needed part of their life.

App. E, 1109.

5. Finally, Dr. Humphrey testified that people like petitioner exhibit a well-defined set of psychological characteristics which, in an "absolute and positive" way, distinguish them from persons who commit violent homicides against strangers and "constitute a continuing threat to public safety." App. E., 1103-05, 1109, 1118-22, 1124. In considering the distinct sets of psychological responses characterizing offenders who are dangerous to the public at large and those who are not, Dr. Humphrey was "struck ... [with] the consistency of Mr. Boyd's life with what we found to be true" of "people ... who will not destroy a stranger, will not indiscriminately kill. They do not constitute a threat to the public." App. E, 1108-09; see id. at 1123-24.

The jury heard none of this evidence. The prosecutor objected "that whatever [the hundreds of offenders studied by Dr. Humphrey] may have done in their life time has no bearing

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[11] "[T]he ... thing that struck me as I was talking with Mr. Boyd is his volunteering this information that prior to the homicide he would wake up in the middle of the night with thoughts of killing himself.

"Q. He told you that, that he had thoughts about killing himself?

"A. Yeah. All of this is volunteered information. I never asked him a direct question." App. E, 1108.

whatsoever ... [e]ven if it is determined that Mr. Boyd fits into this same group that they fit into." Without comment, the court ruled the proffered testimony inadmissible in its entirety. App. F, 1138-41.

The excluded evidence was the only expert opinion proffered by Mr. Boyd; the only testimony other than his mother's concerning his early childhood; the only evidence of the "chronic stress" inflicted by the traumatic events of his youth; the only evidence linking that chronic stress with the emotional disturbance caused by his girlfriend's rejection of him in the months preceding the killing; and the only evidence causally linking his resulting suicidal "depression" with the offense. It was also the only testimony establishing that Mr. Boyd lacks a propensity for indiscriminate violence against the public. The excluded testimony constituted over 70 percent of the pre-offense evidence, other than his own testimony, which Mr. Boyd sought to present in mitigation.

4. Closing argument and instructions at the capital sentencing phase

In their closing arguments, the prosecutors both reprised the theme of Mr. Boyd's asserted propensity for violence against "citizens on the streets, not only in Mt. Airy but anywhere," and the need to extinguish his life lest he "come out of prison on parole early" and endanger others at "the Mall, ... a car wash, ... your church." T. 1204, 1208-11, 1217-18, 1222, 1227-28, 1252-58. They also repeatedly portrayed Mr. Boyd as having a "self-centered . . . selfish motivation to take away somebody else's life." T. 1211; see T. 1220, 1236, 1245, 1247.

Finally, referring to a list of proffered mitigating circumstances the defense had submitted to the court as required by North Carolina law (T.R. 77-78), the prosecutors discussed other matters the defense had unsuccessfully attempted to address in Dr. Humphrey's excluded testimony. For example:

a. Addressing the proffered mitigating circumstance that the crime was committed "while [Mr. Boyd] was under the influence of mental or emotional disturbance," one of the prosecutors asked: "What mental or emotional disturbance have you jurors heard about other than the jealous rage that man right there may have had? ... What have you heard that is believable, other than the fact that he was normal there that day?" T. 1236-37.

b. Addressing the proffered mitigating circumstance, that the "defendant suffered the loss of his grandfather at an early age," one of the prosecutors argued: "It's ridiculous. You may very well find, I don't doubt, that the grandfather died at an early age. But there again, I'm right back there where I always come to. So what, insofar as this case is concerned?" T. 1248-49 (emphasis added). See also T. 1220.

c. Addressing the proffered mitigating circumstance that Mr. Boyd "knew and cared for the deceased:"

> Well, I'll be dogged! Does that mean I can go home and if I get mad at somebody that I care about, that I can lurk on them like the jackal he was and did out there and stab away .... It's ridiculous. You know it is .... I'll concede that he cared for her. But if he did, there again I'll say this, so what? Does that make it all right? There again is where you may find it existed, but you do not have to attach any significant weight to it, insofar as it mitigates this crime and makes this crime okay. [12]

Following argument, the trial court instructed the jurors that they had to impose the death penalty if they answered three questions affirmatively: (1) whether one or more aggravating circumstances existed; (2) whether the aggravating circumstancese

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[12] T. 1245-47 (emphasis added); see T. 1219. See also T. 1219-20, 1240, 1244-46. As here, the prosecutors repeatedly told the jurors that even if they found the circumstances listed by the defense to be factually true, they need "not accord them any weight in mitigation" if they did not understand exactly how those facts lessened Mr. Boyd's moral culpability or explained the offense. T. 1236-37 (emphasis added). See, e.g., T. 1220, 1247, 1248.

were sufficiently substantial to warrant death; and (3) whether the aggravating circumstance established by the State outweighed (to whatever degree) the mitigating circumstances established by the defense.[13]

The jurors found two aggravating circumstances present --that Mr. Boyd had been convicted in 1963 of a felony involving the use or threat of violence to the person, and that the murder was "especially heinous, atrocious or cruel." As instructed over defense objection, the jury did not specify which of the mitigating circumstances it had been instructed to consider were present, finding only that "one or more mitigating circumstances" was present. Concluding that the two aggravating circumstances "out weigh[ed]" whatever mitigating circumstance(s) it found, the jury reached the then-mandatory verdict of death. T. 1314, 1332, 1338, 1340, 1343-44; T.P. 52-55.

D. Appellate Proceedings

On appeal, Mr. Boyd challenged the constitutionality of his death sentence on the grounds, inter alia, that the trial court: (1) excluded mitigating evidence proffered by the defense, in violation of the Eighth and Fourteenth Amendment principle of Lockett v. Ohio, 438 U.S. 586 (1978), and its progeny; and (2) excluded two jurors for cause based upon their generalized conscientious scruples against the death penalty, in violation of the Fourteenth Amendment principle of Witherspoon v. Illinois, 391 U.S. 510 (1968). Defendant-Appellant's Brief at 26-34, 76-80. A majority of the Supreme Court of North Carolina rejected both claims on their merits. App. A, 319 S.E.2d at 197-99, 205-06.

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13 T. 998-1000, 1308-10, 1316, 1334-36; T.P. 52-55. The instructions given at Mr. Boyd's trial track those discussed in Smith v. North Carolina, ____ U.S. ____, 74 L.Ed.2d 622, 622-23 (1982) (Stevens, J., respecting the denial of the petition for a writ of certiorari).

With regard to the exclusion of Dr. Humphrey's testimony, the majority focused exclusively on a draft report of the criminologist's latest study, rather than on his actual testimony, although the court acknowledged that the proffered testimony provided additional "pertinent information [and] ... details" not included in the unproffered report. See n.10 supra. The majority affirmed because "the report lacks comprehensiveness[,] ... is characterized by general conclusions of questionable scientific import" and "merely constructs ... a profile into which the defendant fits;" and because "each of the stressful events" in Mr. Boyd's life on which Dr. Humphrey relied in reaching his conclusion "was presented to the jury in considerable detail through the testimony of the defendant, his mother, and other witnesses." Id. at 199.

Justice Exum, joined by Justice Martin, dissented, based on this Court's decisions in Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978). App. A, 319 S.E.2d at 207-11. Given the competing "motive" theories presented at the sentencing phase, which pitted the State's assertion that "the crime was motivated by defendant's mean selfishness" against the defense contention that the crime was the result of "unbearable" emotional distress at "the thought of losing Wanda," the dissenting justices concluded that the trial court had effectively precluded the jury from hearing the "testimony upon which [Mr. Boyd's] theory wholly rested:"

> Decisions of the United States Supreme Court have been replete with references which point consistently to the proposition that a death sentence may not be constitutionally carried out if the sentencing authority is not permitted to consider all aspects of a defendant's character, mentality, emotional

makeup, record, and circumstances of the crime which might tend to mitigate the offence in the eyes of the jury ....

Professor Humphrey's testimony meets all these requirements for admissibility....

.... Since Professor Humphrey's testimony was the linchpin of defendant's theory of mitigation and given his impressive academic credentials, there is a reasonable possibility that admission of his testimony would have produced a different result at trial.

Id. at 209-10. (emphasis added)

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE JUDGE AT THE SENTENCING PHASE OF MR. BOYD'S CAPITAL TRIAL CONSTITUTIONALLY PRECLUDED THE JURY FROM HEARING THE ONLY EXPERT TESTIMONY HE PROFFERED IN MITIGATION CONCERNING HIS UNHAPPY FAMILY BACKGROUND, HIS PSYCHOLOGICAL HISTORY AND EMOTIONAL STATE AT THE TIME OF THE OFFENSE, AND THE CONSISTENCY OF THOSE FACTORS WITH THE PROFILE OF DOMESTIC HOMICIDE OFFENDERS WHO DO NOT CONSTITUTE A CONTINUING THREAT TO THE PUBLIC

A. The Conflict Between The Decision Below And The Principle Of Lockett v. Ohio

In Lockett v. Ohio, 438 U.S. 586 (1976), a plurality of the Court concluded "that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (plurality opinion) (emphasis in original). The plurality concluded that a statute which prevents the sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty:"

> When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605.

As predicted, the plurality opinion in Lockett has been a "seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment,"[14] and every member of the Court has embraced the Lockett plurality's conclusion on several occasions since 1976. E.g., California v. Ramos, ___ U.S. ___, 77 L.Ed.2d 1171, 1180 (1983); Barefoot v. Estelle, ___ U.S. ___, 77 L.Ed.2d 1090, 1107 (1983); Zant v. Stephens, ___ U.S. ___, 77 L.Ed.2d 235, 251 (1983); Enmund v. Florida, 458 U.S. 782, 798 (1982); id. at 827-28 (O'Connor, J., dissenting); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); id. at 117-118 (O'Connor, J., concurring); Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam). Although originally applied to a statutory preclusion of proffered mitigating evidence, the Lockett principle has since been applied by the Court to a sentencer's failure to consider mitigating evidence,[15] and to a trial judge's exclusion of such evidence from presentation to a capital-sentencing jury.[16]

The Eighth and Fourteenth Amendment standard of relevance recognized in Lockett has been defined by the Court as encompassing evidence bearing on "the defendant's character, prior

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[14] Lockett v. Ohio, supra, 438 U.S. at 632 (Rehnquist, J., concurring in part and dissenting in part).

[15] "Just as the State may not by statute preclude the sentencer from considering any mitigating factors, neither may the sentencer refuse to consider ... mitigating evidence." Eddings v. Oklahoma, supra, 455 U.S. at 113-15; see also Enmund v. Florida, supra, 458 U.S. at 830 (O'Connor, J., dissenting).

[16] Green v. Georgia, supra. The Courts of Appeals have also applied the Lockett principle to jury instructions which effectively limit the sentencing jury's consideration of proffered mitigating evidence. E.g., Westbrook v. Zant, 704 F.2d 1487, 1502-03 (11th Cir. 1983); Spivey v. Zant, 661 F.2d 464, 470 (5th Cir. 1981); Washington v. Watkins, 655 F.2d 1346, 1367-77, revised and rehearing denied, 662 F.2d 1116 (5th Cir. 1981).

record,"[17] "background, intelligence, prior offenses, ... habits,"[18] "history, mental condition, ... physical condition,"[19] and "propensities,"[20] "the nature and circumstances of the crime," as well as all "compassionate or mitigating factors stemming from the diverse frailties of humankind,"[21] and "any [other] aspect of a defendant's character or record and any of the [other] circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[22]

More specifically, and of particular importance here, the Court has explicitly brought within the ambit of Lockett's constitutional standard of relevance evidence of the "family background," "personal history,"[23] and "past life ... of the particular offender,"[24] including his "unhappy childhood" and "broken home;"[25] the defendants' "emotional state at the time of"[26] and "the circumstances surrounding the crime,"[27] including "the influence of ... emotional disturbance,"[28] "emotional pressure"[29]

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17 Lockett v. Ohio, supra, 438 U.S. at 604 n.12.

18 Bell v. Ohio, 438 U.S. 637, 640 (1978) (plurality opinion).

19 California v. Ramos, supra, 77 L.Ed.2d at 1184.

20 Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937), quoted Eddings v. Oklahoma, supra, 455 U.S. at 112.

21 Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion), quoted in Enmund v. Florida, supra, 458 U.S. at 827 (O'Connor, J., dissenting).

22 Lockett v. Ohio, supra, 438 U.S. at 604 (emphasis added).

23 Eddings v. Oklahoma, supra, 455 U.S. at 117 (O'Connor, J., concurring).

24 Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion), quoting Williams v. New York, 337 U.S. 241, 247 (1949).

25 McGautha v. California, 402 U.S. 183, 187-88 (1971), cited in Eddings v. Oklahoma, supra, 455 U.S. at 115.

26 Eddings v. Oklahoma, supra, 455 U.S. at 111 n.6, quoting Gregg v. Georgia, 428 U.S. 153, 197 (1976) (plurality opinion).

27 Estelle v. Smith, 451 U.S. 454, 472 (1981) (emphasis added).

28 Eddings v. Oklahoma, supra, 455 U.S. at 107, 115; Roberts v. Louisiana, 431 U.S. 633, 637 (1977) (per curiam); Gregg v. Georgia, 428 U.S. 153, 190-94 & n.44 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242, 251 (1976) (plurality opinion).

or "emotional trauma;"[30] "the "defendant's ... motives" and the degree of his "moral depravity;"[31] whether the defendant "act[ed] in passion [and is one] for whom the threat of death has little deterrent effect;"[32] and "whether this particular defendant is one whose possible return to society is desirable,"[33] given his "propensity" or lack of propensity "to commit other violent acts,"[34] his "remorse or sorrow for what he has done,"[35] and his "favorable ...prognosis for rehabilitation."[36]

Finally, Lockett and its progeny make clear that each of these formulations should be interpreted consistently with the goal of assuring "the sentenc[er's] ... 'possession of the fullest information possible concerning the defendant's life and characteristics,'" because all such information "is 'highly relevant ... [to the] selection of an appropriate sentence.'" Lockett v. Ohio, supra, 438 U.S. at 602-03, quoting Williams v. New York, 337 U.S. 241, 247 (1949) (emphasis added).[37]

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29 Jurek v. Texas, 428 U.S. 262, 272-73 (1976) (plurality opinion), quoting Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Cr. App. 1975).

30 Godfrey v. Georgia, 446 U.S. 420, 443 (1980).

31 Enmund v. Florida, supra, 458 U.S. at 823, 826 (O'Connor, J., dissenting).

32 Gregg v. Georgia, 428 U.S. 153, 186 (1976).

33 California v. Ramos, supra, 77 L.Ed.2d at 1183.

34 Estelle v. Smith, 451 U.S. 454, 472-73 .

35 Id. at 459-60, 464 n.9 (1981); McGautha v. California, 402 U.S. 183, 187 (1971), cited in Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

36 Lockett v. Ohio, supra, 438 U.S. at 594.

37 Accord, California v. Ramos, supra, 77 L.Ed.2d at 1184, quoting Jurek v. Texas, 428 U.S. 267, 276 (1976) (plurality opinion) (emphasis added) (it is "essential ... that the jury have before it all possible relevant information about the individual defendant whose fate it must determine"); Barefoot v. Estelle, supra, 77 L.Ed.2d at 1107 (emphasis added) ("the jury should be presented with all of the relevant information" and "as much information as possible").

By excluding Dr. Humphrey's testimony, the trial court precluded the jury from considering evidence falling into every category of constitutionally relevant evidence identified in the decisions of this Court cited in the preceding five paragraphs. See pp. 20-23 & nn. 14-37 supra. By affirming Mr. Boyd's death sentence notwithstanding that preclusion, the decision of the Supreme Court of North Carolina stands in conflict with all those decisions. A writ of certiorari to resolve that conflict must accordingly issue.

First, taken as a whole, the testimony which the jury was precluded from hearing was an exposition both of "the defendant's...background [and] history" and "the nature and circumstances of the crime"[38] -- i.e., regarding Mr. Boyd's background, the losses of his father and grandfather as engraved in his single earliest memories, his inability thereafter to make or keep friends, and his loss of liberty as a juvenile; regarding the offense, the close personal relationship between the victim and offender and the extreme impact on Mr. Boyd's emotional state of the victim's severing of those ties.[39] See pp. 13-15 supra.

More particularly, Dr. Humphrey's excluded testimony was the only evidence expressly linking the chronic stress inflicted by the inordinate amount of personal losses characterizing Mr. Boyd's "unhappy childhood" and "broken home,"[40] to the "emotional trauma"[41] caused by the loss of Wanda Hartman's affections just prior to the offense. It was the only evidence demonstrating how

[38] California v. Ramos, supra, 77 L.Ed.2d at 1184.

[39] See Godfrey v. Georgia, 446 U.S. 420, 443 (1980), recognizing as an offense-related mitigating factor that the victims "were members of [defendant's] family who were causing him extreme emotional trauma." Accord, Herzog v. State, 439 So.2d 1372, 1374, 1381 (Fla. 1983)((the "domestic relationship that existed [for two months] prior to the murder between the offender and the victim" found to be a mitigating circumstance based on which the death penalty for a brutal suffocation-murder was reduced to life imprisonment).

[40] McGautha v. California, 402 U.S. 183, 187-88 (1971), cited in Eddings v. Oklahoma, supra, 455 U.S. at 115.

[41] Godfrey v. Georgia, 446 U.S. 420, 443 (1980).

that accumulation of losses would affect Mr. Boyd's "emotional state at the time of the crime,"[42] inflicting intense depression. Most importantly, it was the only evidence of any sort revealing that -- and explaining how -- this "emotional disturbance"[43] actually precipitated the offense, and how, to that degree, Mr. Boyd "act[ed] in passion," without any "cold calculus ... precedfing] the decision to act."[44] See pp. 13-15 supra.

Further, the excluded testimony was the only proffered evidence explaining Mr. Boyd's "motive"[45] in the killing as a "self-destructive" desire to hurt himself, by "destroying that which [he] ... fear[ed] losing most," rather than as a "self centered purpose" to "take her away from" other men, as the prosecutors argued. T. 1211. The ruling thereby deprived the jury of testimony substantially qualifying the "moral depravity"[46] exhibited by Mr. Boyd's act.

Finally, although they sanctioned the prosecutors' constant "future dangerousness" refrain in oral argument (see pp. 6-9, 16 supra), the North Carolina courts precluded Mr. Boyd from presenting any mitigating evidence of his "favorable prognosis" for avoiding further violence should he ultimately "be returned to society."[47] Following the established North Carolina rule that a defendant's propensity for nonviolent behavior and his capacity for rehabilitation are "totally irrelevant to sentencing,"[48] the

[42] Eddings v. Oklahoma, supra, 455 U.S. at 111 n.6.

[43] Gregg v. Georgia, 428 U.S. 153, 193-94 & n. 44 (1976) (plurality opinion).

[44] Id. at 186.

[45] Enmund v. Florida, supra, 458 U.S. at 826 (O'Connor, J., dissenting).

[46] Id. at 823.

[47] Lockett v. Ohio, supra, 438 U.S. at 594.

[48] State v. Pinch, 292 S.E.2d 203, 220, 224 (N.C. 1982); accord, State v. Williams, 292 S.E.2d 243, 259 (N.C. 1982).

courts below precluded the jury from hearing Dr. Humphrey's testimony that Mr. Boyd "does not constitute a threat to the public." T. 1109.

B. The Conflict Between The Decision Below And Three Recent Decisions Of This Court Applying The Lockett Principle

The conflict between the North Carolina Supreme Court's decision and three of this Court's recent decisions is particularly manifest.

1. The conflict between the decision below and Eddings v. Oklahoma

The resolution below of the critical "mitigative relevance" question (App. A, 319 S.E.2d at 198) conflicts with this Court's application of the Lockett principle in Eddings v. Oklahoma, supra. In Eddings, the court reversed a death sentence because the sentencing judge, although presented with mitigating evidence, may not actually have considered it in mitigation. In its opinion, the Court "list[ed] in detail some of the circumstances surrounding the petitioner's life, [in order] ... to emphasize the variety of mitigating information that may not have been considered by the [sentencer] in deciding whether to impose the death penalty." Eddings v. Oklahoma, supra, 455 U.S. at 110 (O'Connor, J., concurring) (emphasis added); accord, id. at 113 (majority opinion). The "detail[ed] ... mitigating information" delineated by the Court in Eddings is very nearly an outline of the proffered testimony that the jury in this case neither heard nor considered.

Eddings' evidence consisted of the testimony of three social scientists, including a "sociologist," like Dr. Humphrey, "specializing in [studying] ... offenders." Id. at 107-08 & n.2. Moreover, like Dr. Humphrey, Eddings' experts had sought to delineate the fact and effect on the defendant of his "troubled youth," his parents' "divorce," and his single-parent upbringing

"without ... [male] supervision," his "bitter[ness]" at his absent father and, in general, his "emotional[] disturb[ance]" and abnormal "emotional development." Id. at 107. Moreover, just as Dr. Humphrey tried to do below (and no other witness presented by Mr. Boyd could or did do) Eddings' experts had attempted to explain how the defendant's personal losses and "unhappy upbringing" brought on "emotional disorders" which in turn precipitated, indeed, "preordained," his killing a policeman.[49] Id. at 108 & n.2, 109; id. at 123 n.4 (Burger, C.J., dissenting). Finally, Eddings' sociologist, like Dr. Humphrey, sought to establish that "Eddings would no longer pose a serious threat to society."[50] Id. at 107-08.

Given the identity of the evidence improperly excluded from consideration in both cases, the North Carolina Supreme Court's "irrelevancy" ruling below clearly conflicts with Eddings' holding "that the evidence ... offered was relevant mitigating evidence," and, indeed, was "particularly relevant." Id. at 115.[51]

Eddings is likewise in conflict with the North Carolina Supreme Court's alternative suggestion that, even were the excluded evidence relevant, the jury could nonetheless be precluded from hearing it because it "offer[ed] little" and was "of questionable ... value in mitigation." App. A, 319 S.E.2d at 199. As both the majority and dissent in Eddings agreed dis-

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49 Analogous to Dr. Humphrey's proffered testimony that, in Mr. Boyd's mind, his crime against Wanda Hartman was actually a self-destructive act against himself (see p. 15 supra), one of Eddings' expert witnesses testified that "at the time of the murder, Eddings was in his own mind shooting his stepfather -- a policeman who had been married to his mother for a brief period." Eddings v. Oklahoma, supra, 455 U.S. at 108 n.2.

50 Indeed, unlike Eddings, who was diagnosed as a violence-prone "sociopath" who could only be "rehabil.tated by intensive therapy over a 15 to 20 year period," Eddings v. Oklahoma, supra, 455 U.S. at 108 n.2, Dr. Humphrey sought to establish that Mr. Boyd was not a sociopath, and not prone by nature to "indiscriminate" violence, but rather that, even absent rehabilitation, he was not "a threat to the public." See p. 15 supra.

51 Footnote 51 on page 28.

51 In addition to Eddings, the decision below conflicts with numerous decisions of state courts of last resort concerning the mitigative relevance of expert testimony identical to that proffered by Mr. Boyd. See, e.g., Mann v. State, 420 So.2d 578, 580-81 (Fla. 1982) (sentencer's failure to consider in mitigation expert psychiatric testimony concerning the link between the defendant's "depression" and "feelings of rage against himself" and the crime is reversible error; such evidence is "particularly significant [where] it [explains] the properly found aggravating circumstance of the crime being especially heinous, atrocious or cruel"); People v. Carlson, 404 N.E.2d 233, 235-38, 244-45 (Ill. 1980) (defendant killed a police officer who was trying to arrest him for fatally shooting his ex-wife soon after she had divorced him and informed him she was seeing other men; the following facts established entirely through expert testimony held to be mitigating and to require reduction of death sentence to life sentence because they did "not bespeak a man with a malignant heart who must be permanently eliminated from society:" defendant underwent "emotional deterioration" and "a slow grieving process related to the loss of his wife;" as a result he was "extremely distraught" at the time of the offenses and "intended to commit suicide;" given the relationship of the killing to "unique matters" relating to his wife, the defendant was "unlikely to commit such an offense" again); Burrows v. State, 640 P.2d 533, 537, 550,553 (Okla.Cr. App. 1982) (a clinical psychologist's testimony--that a threat by defendant's wife to divorce him and thereby to deprive him of a relationship with his son like the one he had been "deprived of ... with his own father" due to his parents' divorce put defendant in "a state of rage and panic" which in turn led him to kill his wife -- held mitigating and sufficient to require reduction of death to life sentence). See also State v. McMurtrey, 664 P.2d 637, 645-46 (Ar. 1983); People v. Hurteshad, 631 P.2d 446, 453 (Cal. 1983); Woody v. State, 418 So.2d 989, 995 (Fla. 1982); Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975); State v. Martin, 376 So.2d 300, 313 (La. 1979); Ciarrotano v. Commonwealth, 266 S.E.2d 94, 101-02 (Va. 1980).

The decision below also conflicts with "the current legislative judgment with respect to impositon of the death penalty," on which this Court has relied in applying the Eighth Amendment. Enmund v. Florida, 458 U.S. 782, 792-93 (1982). Thirty of the 35 post-Furman v. Georgia death penalty statutes currently in effect enumerate mitigating circumstances; of those, 27 enumerate "emotional disturbance" at the time of the offense. Ala. Code § 13A-5-51(2); Cal. Penal Code § 190.3(d); Colo. Rev. Stat. § 16-11-103(5.1)(a); Fla. Stat. Ann. § 921.141(6)(b); Ill. Ann. Stat. ¢ 38 ¢ 9-1(e)(2); Ind. Code Ann. § 35-50-2-9(c)(2); Ky. Rev. Stat. & R. Serv. 532.025(2)(b)(2); La. Code Crim. Proc. Ann. art. 905.5 (b); Md. Ann. Code art. 27, § 413(g)(4); Miss. Code Ann. § 99-19-101(6)(b); Mo. Rev. Stat. § 565.012(3)(2); Mont. Code Ann. § 46-18-304(2); Neb. Rev. Stat. §§ 29-2523(2)(b), (c); Nev. Rev. Stat. § 200.032(2); N.H. Rev. Stat. Ann. § 630:5(III)(b)(2); N.J. Stat. Ann. 2C:11-3(C)(5)(a); N.M. Stat. Ann. § 31-20A-6(d); N.C. Gen. Stat. § 15A-2000(f)(2); 42 Pa. Cons. Stat. Ann. § 9711(e)(2); S.C. Code Ann. § 16-3-20(C)(b)(2); Tenn. Code Ann. § 39-2-203(g)(2); Utah Code Ann. § 76-3-207 (1)(b); Va. Code § 19.2-264.4(B)(ii); Wash. Rev. Code Ann. § 10.95.070(2); Wyo.Stat. § 6-4-102(i)(ii). The three remaining statutes all enumerate the defendant's diminished capacity to appreciate the wrongfulness of his act or to conform his actions to the law. Ariz. Rev. Stat. Ann. § 13-702(E)(2); Conn. Gen. Stat. Ann. § 53a-46a(f)(2); Ohio Rev. Code Ann. §2929.04(B)(3).

agreeing only on the question, not controverted here, whether the sentencer had actually considered the disputed evidence), the great or "little" weight due evidence constitutionally relevant under the Lockett principle may not be a basis for its exclusion:

> The sentencer ... may determine the weight to be given relevant mitigating evidence. But [the courts] may not give it no weight by excluding such evidence from the [sentencer's] consideration.

Id. at 114-115. Accord, id. at 125-26 (Burger, C.J., dissenting).[52]

2. The conflict betweeen the decision below and Barefoot v. Estelle

The decision below also conflicts with this Court's recent decision in Barefoot v. Estelle, supra.

First, in Mr. Boyd's case, as on previous occasions, see n. 49 supra, the North Carolina Supreme Court categorically excluded as "irrelevant" all evidence concerning the defendant's prospects

52 This rule is particularly important here, given that the jury: (1) expressly concluded that there were mitigating circumstances in Mr. Boyd's case, even apart from those which it was prevented from considering via Dr. Humphrey's testimony; but (2) was required to sentence Mr. Boyd to die so long as these mitigating circumstances were outweighed -- even minutely or marginally -- by the aggravating circumstances. See Smith v. North Carolina, ___ U.S. ___, 74 L.Ed.2d 622, 622-23 (1982) (Stevens, J., respecting the denial of the petition for a writ of certiorari). Consequently, any weight, however "little," might well have tipped the delicate balance in Mr. Boyd's favor. See Eddings v. Oklahoma, supra, 455 U.S. at 119 (O'Connor, J., concurring), quoting Lockett v. Ohio, supra, 438 U.S. at 605 (emphasis added) ("Lockett compels a remand" whenever there is a "'risk that the death penalty [was] imposed in spite of factors which may call for a less severe penalty'" and "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the sentencer").

In any event, Dr. Humphrey's testimony did not "offer little" in mitigation. Rather, as Mr. Boyd's only expert testimony, the only evidence linking his childhood problems with his emotional disturbance at the time of the offense and causally linking both to the killing, his only evidence that the killing was not a selfish act of "indiscriminate" violence, but rather an intentionally self destructive act, and the only evidence of his lack of a propensity for violence, the excluded evidence clearly "was the linchpin of [his] ... theory of mitigation." App. A, 319 S.E.2d at 210 (Exum, J., dissenting).

for living peaceably in the future should he not be executed.[53] Barefoot just as categorically establishes the contrary proposition, that "all relevant evidence ... should be admitted ... [concerning] future dangerousness" or nondangerousness and that "the jurors should not be barred from hearing the views of the State's psychiatrists" on that question "along with the opposing views of the defendant's doctors." Barefoot v. Estelle, supra, 77 L.Ed.2d at 1107-08 (emphasis added). As the Court simultaneously held in California v. Ramos, supra, concerning the question "whether this particular defendant is one whose possible return to society is desireable:"

> Any contention that injecting this factor into the jury's deliberation constitutes a departure from the kind of individualized focus required in capital sentencing decisions was implicitly rejected by the decision in Jurek [v. Texas, 428 U.S. 262 (1976)].[54]

California v. Ramos, supra, 77 L.Ed.2d at 1184-85.[55]

Second, Barefoot holds, in conflict with the decision below, that even if factors relevant to capital sentencing, including "future dangerousness," are supported by nonexpert testimony in the record, it is still error to preclude either side from adducing expert social scientific testimony on the question. For "'factual issues'" subject to lay testimony often "'represent only the beginning of the inquiry'" in a capital sentencing trial; typically, the actually determinative question such as "[w]hether the individual is mentally ill [or] dangerous to ... others, ... turns on the meaning of the facts which must be

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53 It did so, notwithstanding its approval on appeal of extensive prosecutorial argument at both phases of trial that the jury was "duty"-bound to sentence Mr. Boyd to die in order to prevent him from committing violent crimes in the future. App. A, 319 S.E.2d at 193, 196-97, 199; see p. 8-9, 16-17 supra.

54 Accord, Estelle v. Smith, 451 U.S. 454, 472-73 (1981) ("As to the jury question on future dangerousness, the joint opinion [in Jurek] emphasized that a defendant is free to present whatever mitigating factors he may be able to show").

55 Footnote 55 on page 31.

55 In conflict with the decision below and North Carolina decisions cited in n. 48 supra, every other state court of last resort that has addressed the question has applied the Lockett principle to require consideration of proffered evidence that the defendant either lacks a propensity for violence or that he can be weaned of that propensity through rehabilitative efforts: State v. Watson, 629 P.2d 943, 945-47 (Az. 1981); McCampbell v. State, 421 So.2d 1072, 1075-76 (Fla. 1982); Simmons v. State, 419 So.2d 316, 317-18, 320 (Fla. 1982); Conner v. State, 303 S.E.2d 266, 274 n.9 (Ga. 1983); People v. Devlin, 444 N.E.2d 102, 110 (Ill. 1982); People v. LaPointe, 407 N.E.2d 196, 203, 204 (Ill.App. 1980); Moore v. Commonwealth, 634 S.W.2d 426, 434-35 (Ky. 1982); Johnson v. State, 439 A.2d 542, 556 (Md. 1982); Simmons v. State, 622 S.W.2d 934, 939-40 (Tex. Cr. App. 1975); Clark v. Commonwealth, 257 S.E.2d 784, 790 (Va. 1979). The rule in South Carolina is unclear. Compare State v. Woomer, 299 S.E.2d 317, 319-20 (S.C. 1982), with State v. Koon, ___ S.E.2d ___, No. 22075 (S.C. Apr. 3, 1984). See also United States v. Grayson, 438 U.S. 41, 47-48 (1978) (sentencer is "obligated to make [its] decision on the basis ... of predictions regarding the defendant's potential, or lack of potential, for rehabilitation").

A review of the state cases indicates that the North Carolina Supreme Court has consistently applied a more restrictive rule of mitigative relevance in capital cases than any other court in the country. Compare, e.g., (1) State v. Irwin, 282 S.E.2d 439, 446-47 (N.C. 1981) (not error under Lockett to preclude defendant from adducing evidence of his accomplice's lesser penalty), with Wasser v. State, 330 So.2d 137, 141-42 (Fla. 1976) (reversible error to prohibit the defendant from introducing mitigating evidence "of the plea-bargained second degree murder sentence received by [his] accomplice"), and People v. Gleckler, 411 N.E. 2d 849, 861 (Ill. 1980)(similar); (2) State v. Pinch, 292 S.E.2d 203, 224 (N.C. 1982) (permissible under Lockett for trial judge's instructions to preclude consideration in mitigation of defendant's "low-normal" intelligence and I.Q. of 66), with Quince v. State, 419 So.2d 185, 186-87 (Fla. 1982) ("dull normal" or "borderline intelligence" considered in mitigation), and Johnson v. State, 439 A.2d 542, 549-50 & n.6 (Md. 1982) (defendant's "dull-normal" or "borderline intelligence" and 72 I.Q. must be considered in mitigation), and State v. Simants, 250 N.W.2d 881, 892 (Neb. 1977) ("borderline intelligence"); (3) State v. Pinch, supra, 292 S.E.2d at 224 (questioning mitigative relevance of evidence of "chronic depression"), with State v. McMurtrey, 664 P.2d 637, 645-46 (Az. 1983) ("depression" along with other "mitigating" circumstances relied upon as basis for reducing death penalty to life imprisonment), and Mann v. State, 420 So.2d 578, 581 (Fla. 1982) (reversible error for sentencer not to consider in mitigation psychiatric evidence of defendant's "depression"); (4) State v. Brown, 293 S.E.2d 569, 587 (N.C. 1982) and State v. Williams, 292 S.E.2d 243, 261 (N.C. 1982) (trial court may preclude the jury from considering in mitigation evidence of intoxication short of that which meets the statutory "diminished capacity" test), with Bell v. State, 360 So.2d 1206, 1213 (Miss. 1978) (lesser level of intoxication relevant in mitigation), and State v. Simants, 250 N.W.2d 881, 892 (Neb. 1977) (similar), and Burrows v. State, 640 P.2d 533, 537 (Okla. Cr. App. 1982) (similar).

The Court should grant certiorari to resolve the conflict between the North Carolina Supreme Court's uniquely narrow approach to the "mitigative relevance" question in capital cases and the approach of all other state courts of last resort which have spoken on the issue.

interpreted by expert [witnesses]."[56] Barefoot v. Estelle, supra, 77 L.Ed.2d at 1107, quoting Addington v. Texas, 441 U.S. 418, 429 (1979) (emphasis added). Indeed, the Barefoot Court approved precisely the expert technique explicitly disapproved below -- i.e., the expert's "construct[ion of] a profile" of different types of offenders (e.g., sociopathic killers versus nonsociopathic, domestic killers) and expression of an opinion about this defendant's likely propensities based on "which [profile] the defendant fits" (App. A, 319 S.E.2d at 199). Barefoot v. Estelle, supra, 77 L.Ed.2d at 1108 n. 7, 1109. Accord, Jurek v. Texas, supra, 428 U.S. at 273.

Finally, the decision below conflicts with Barefoot insofar as it concludes that Dr. Humphrey's testimony was properly excluded because a preliminary report he had drafted for other purposes was assertedly "characterized by general conclusions of questionable scientific import."[57] App. A, 319 S.E.2d at 198-99.

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[56] Every other state court of last resort which has considered this question has decided it in conflict with the decision below, concluding that no matter how much lay testimony the defendant has presented in mitigation concerning his background, character, propensities, and offense, the preclusion of the sentencer from hearing expert (typically social scientific) testimony on the same questions is reversible error under Lockett. E.g., Miller v. State, 332 So. 2d 65, 67-68 (Fla. 1976); Nesser v. State, 330 So. 2d 137, 142 (Fla. 1976); Sprouse v. State, 296 S.E.2d 584, 586-87 (Ga. 1982); Moore v. Commonwealth, 634 S.W.2d 426, 434-35 (Ky. 1982); State v. English, 367 So.2d 815, 818-19, 827 (La. 1979); Johnson v. State, 439 A.2d 542, 556 (Md. 1982); State v. Wood, 648 P.2d 71, [illegible], 86-87 & n.16 (Utah 1982).

The importance of explanatory expert testimony is particularly manifest here, given that the prosecutors in closing argument: (a) expressed their own opinions on some of the questions (e.g., future dangerousness) which Dr. Humphrey was prevented from addressing; and (b) admitted the historical facts established by Mr. Boyd regarding several of the mitigating circumstances which the jury was instructed to consider (e.g. his desertion by his father, the death of his grandfather, and his close relationship and attempted reconciliation with the victim) but argued that there was nothing in the record explaining how those facts in any way lessened his culpability or explained the offense as anything but a depraved and "selfish" act. See pp. 8-9, 16-17 supra.

[57] The North Carolina Supreme Court's fixation on Dr. Humphrey's preliminary report was beside the point in any event. The report was not proffered for the jury but only made available to the prosecution as a courtesy, for use in cross-examination, and Dr. Humphrey made clear that his opinions about Mr. Boyd were not based alone or even in major part on the preliminary and incomplete findings reflected in the draft report, but also on (a) 15

In Barefoot, the Court held that the state's experts could not be precluded from testifying on the question of "future dangerousness" even though "psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior." Barefoot v. Estelle, supra, 77 L.Ed.2d at 1107-08, 1109 n. 7. "[P]rofessional doubts about the usefulness of psychiatric predictions may be called to the attention of the jury" via cross-examination or "contrary evidence by the opposing party," but so long as the "testimony is [not] . . . entirely unreliable" or "always wrong", it must be admitted and "its weight left to the fact finder."[58] Id. at 1107-09 & n.7 (emphasis added). The conflict between Barefoot and Boyd on this point is made manifest by Justice Exum's dissenting argument below that "[m]any expert opinions in controversial areas are not only 'questionable'; they are often vigorously questioned by opposing experts in courts of law. That an expert's opinions may be 'questionable' has never been a ground for excluding them from evidence. It goes to the weight not the admissibility of expert testimony." App. A, 319 S.E.2d at 208.

3. The conflict between the decision below and Green v. Georgia

The decision below also conflicts with this Court's per curiam summary reversal in Green v. Georgia, supra. For, insofar as the North Carolina Supreme Court has applied a local rule of

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years of work in the field of the sociology of violent crime; (b) 10 years of empirical study of that question in North Carolina; (c) over 50 books, articles and papers written by him on the subject; (d) 35 bibliographical references on the specific topic of the effect of stressful life events or violent criminal behavior; and (e) a clinical examination of petitioner. App. F, 1094-106, 1134-35; App. F, 1-7; see p. 12 & n.8 supra.

[58] Barefoot's reasoning with regard to "the views of the State's psychiatrists" applies with even greater force to the "opposing views of the defendant's doctors" (Barefoot v. Estelle, supra, 77 L.Ed.2d at 1107-08), because predictions of future non-dangerousness are substantially more reliable than predictions of future dangerousness. E.g., Mosol, Boucher and Garofalo, The Diagnosis and Treatment of Dangerousness, 18 CRIME & DELINQ. 371 (1972); Ennis & Litwack, Psychiatry and the Presumption of Expertise, 62 CAL. L. REV. 693, 714 n.65 (1974).

mitigative relevance (see n.55 supra), that is more narrow than the one applied in Lockett, Eddings and Barefoot, Green v. Georgia "demonstrates that local relevancy requirements cannot be applied rigidly to exclude mitigating evidence" of the types described in the Court's Eighth Amendment decisions.[59] In Green, pursuant to Georgia's restrictive hearsay rule, the trial court had precluded a witness from testifying in mitigation that Green's codefendant had admitted committing the homicide while Green was not present. Citing Lockett and Chambers v. Mississippi, 410 U.S. 284 (1973), the Court summarily reversed Green's death sentence, ruling that local evidentiary rules "may not be applied mechanically to defeat the ends of justice." Green v. Georgia, supra, 442 U.S. at 97, quoting Chambers v. Mississippi, supra at 302. A like result is appropriate here.

* * * *

Dr. Humphrey was to be Mr. Boyd's most important witness in mitigation. His testimony would have supplied the glue holding together and explaining all the other evidence proffered by Mr. Boyd. It would have been the only expert testimony before the jury; the only testimony professionally verifying Mr. Boyd's "inordinate" emotional disturbance, the genesis of that disturbance in circumstances beyond Mr. Boyd's control, and the causal relationship between that disturbance and his crime; the only professional testimony that Mr. Boyd suffered intensely by his

59 Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 CAL. L. REV. 377, 386 (1981). Accordingly, while the Lockett principle does not prohibit courts from "exclud[ing], as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of the offense," Lockett v. Ohio, supra, 438 U.S. at 604 n.12, courts may not, as here, apply relevancy strictures to preclude evidence that does bear on those factors. See, e.g., the following decisions, all of which are in conflict with the decision below on this point: Smith v. Estelle, 445 F. Supp. 647, 658-59, 664 (N.D. Tex. 1977), aff'd on other grounds, 602 F.2d 694 (5th Cir. 1979), aff'd, 451 U.S. 454 (1981); People v. Harris, 679 P.2d 433, 445-55 (Cal. 1984); Romine v. State, 285 S.E.2d 43, 100-02 (Ga. 1981); Cofield v. State, 274 S.E.2d 530, 541-42 (Ga. 1981); Brown v. State, 270 S.E.2d 822, 825-27 (Ga. 1979); Messer v. State, 330 So.2d 137, 141-42 (Fla. 1976).

act; and the only testimony, professional or otherwise, that Mr. Boyd does not pose a threat of violence in the future. By allowing Mr. Boyd's death sentence to stand notwithstanding its imposition by a jury precluded from hearing all this testimony, the Supreme Court of North Carolina has rendered a decision starkly in conflict with numerous decisions of this Court and of every state court of last resort that has addressed the same or a similar question. See nn.51, 55, 56, 59 supra. The Court should grant certiorari to resolve these conflicts.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT CONSTITUTIONALLY EXCUSED TWO PROSPECTIVE JURORS FOR CAUSE, WITHOUT PERMITTING ANY DEFENSE QUESTIONING, BASED ON THE JURORS' VACILLATING AND EQUIVOCAL ANSWERS TO A SERIES OF MISLEADING QUESTIONS CONCERNING THEIR VIEWS ON THE DEATH PENALTY

During the voir dire of prospective jurors at petitioner's trial, the prosecutors asked the following series of questions 74 times, i.e., once for each juror questioned:[60]

> Question 1 (asked 74 times): "I will ask you what your feelings are about the death penalty. Are you opposed to it, or do you feel it is a necessary law?"

E.g., T. 22, 29 (emphasis added).

> Question 2A (asked of jurors who answered Question 1 that they were "opposed to the death penalty"): "I take it then that regardless of the facts that may develop in this particular case, that you are unwilling to consider the death penalty and vote to impose it in this particular case, regardless of those facts?"[61]

60 The voir dire was conducted in front of the entire venire over the course of three days; some of the prospective jurors were in the courtroom all three days and heard the questions repeated 74 times; all of the prospective jurors heard the questions repeated numerous times.

61 Variations of Question 2A are as follows: "Are you telling me then that regardless of the facts and circumstances that emerge in the course of this trial, you are unwilling to consider and are irrevocably committed against the death penalty. That's what you are telling me, is it not?" (e.g., T. 15 (emphasis added));

E.g., T. 24, 279 (emphasis added).

> Questions 28-1 and -2 (asked of jurors who answered Question 1 that the death penalty is a "necessary law"):
>
> 1. I take it by your answer to that question that you would consider a verdict that involved the death penalty as an appropriate and necessary verdict under the appropriate facts and circumstances as the Court would instruct you?
>
> 2. And, if you are satisfied that the death penalty is the proper punishment for Mr. Boyd in this case, you would vote to impose it?

E.g., T. 124, 511.[62]

Twenty-eight jurors answered Question 1 that they opposed the death penalty on conscientious, religious, or other grounds. All 28 were struck for cause -- 27 after immediately following their "opposed to the death penalty" answer with a simple one- or two- word assent to Question 2A. See p. 9 supra. The twenty-eighth juror, James Arrington, equivocated on Question 2A, vacillated on subsequent questions and was eventually struck for cause. T. 23-26. (Arrington's voir dire is set out in Appendix F.)

Forty-three jurors not struck for cause on other grounds answered Question 1 that they were not opposed to the death penalty because it is a "necessary law." Of those, 42 answered Questions 2B-1 and -2 in the affirmative and were either selected to serve on the jury or stricken peremptorily. The forty-third juror, Garland Smith, answered Question 2B-1 affirmatively but equivocated on Question 2B-2, vacillated on succeeding questions, and was struck for cause. T. 510-17. (Juror Smith's voir dire is set out in Appendix G.)

Nearly all of the "death qualification" questions were asked by the two prosecutors; the judge asked a few, and defense counsel asked none. Defense counsel requested the right to question both vacillating jurors himself, following questions by the prosecutor and the court, but the requests were denied. T. 26, 513, 516.

A commentator who recently reviewed hundreds of instances of death qualification voir dire reported in published judicial opinions rendered since this Court decided Witherspoon v. Illinois, 391 U.S. 510 (1968), has described pattern "death qualification" questions such as those asked at petitioner's trial as follows:

> Prosecutors naturally seek to frame questions likely to elicit a disqualifying answer from a scrupled juror .... [T]here are certain approaches that regularly succeed in moving jurors' responses toward ... opposition to the death penalty, and these techniques are an important reason why so many jurors give inconsistent answers.
>
> The most frequently successful prosecution method for changing a juror's answer to one that may result in disqualification ... and [t]he most striking ..., in light of Witherspoon, is to mislead jurors into thinking that a statement that they do not believe in capital punishment is equivalent to a statement that they would never vote for the death penalty.[63]

Following this pattern, the prosecutors at petitioner's trial succeeded in "moving" all of the prospective jurors who did not believe that the death penalty is a "necessary law" to say that they "opposed" the death penalty, and all but one of those who said they "opposed" the death penalty to say immediately that they "then" could never impose it, prompting their excusal for

---

or, "I take it that you would not consider a death penalty under any facts or circumstances or instructions" (e.g., T. 268); or "then, regardless of the facts and circumstances that might emerge in the course of this trial, you are unwilling to consider and irrevocably committed against the death penalty?" (e.g., T. 272).

62 The form of these questions varied, and they were sometimes preceded by other questions. E.g., T. 124.

63 Schnapper, Taking Witherspoon Seriously: The Search for Death-Qualified Jurors, 62 TEX. L. REV. 977, 1019-20 (1984).

cause. The prosecutors also succeeded in this way in moving the remaining "opposed" venireman (Arrington) and one venireman (Smith) who considered the death penalty "necessary" and "appropriate", toward vacillation on the question whether they could impose that penalty, and both were struck for cause as a result. Moreover, defense counsel was denied the opportunity to break the prosecutors' misleading but apparently logical progression leading prospective jurors from the conclusion that the death penalty is "an unnecessary law" to the conclusion that they "oppose" that penalty, and leading thence to the conclusion that they "could never impose it" even if the law so required. In this manner, 29 prospective jurors were struck for cause.

Furthermore, even apart from these tactics, the two vacillating jurors, Smith and Arrington, were struck for cause as a result of unclear and improper "death qualification" questions and uncertain and insufficient "death qualification" answers, neither of which unequivocally established the jurors' unwillingness to impose death in all cases.

For example, prospective juror Smith stated that he considered the death penalty both "necessary" and "appropriate". He was then asked six times in a row, using various formulations, whether he could impose that penalty. His answers vacillated, respectively, from uncertainty ("I don't know, sir"), to the possibility that he could impose death ("It's possible"), to confusion ("I don't really understand the question"), to "thinking" he could not impose death ("Well, I'm for the death penalty but I just -- in other words, I don't want it on my shoulders and I don't think that I could--[answer interrupted]"). App. G, 511-13. The prosecutor then moved to strike him. App. G, 513-13.

The court refused defense counsel's request at this point to question Smith. Instead the judge himself asked the juror if he understood that the law of North Carolina "provides that in certain cases ... the death penalty may be imposed" and that it is the jury's duty to decide if it should be imposed, to which

Smith responded that he understood; the judge then asked if Smith "ha[d] any quarrel with that law" and Smith answered "no." The judge then twice asked whether Smith "could ... accept" and "apply" that law "in this case," in answer to which Smith again vacillated, first responding "I think so," then responding "I don't know." Asked "another way," whether his mind was "so fixed and set on this that [he] could not consider it," he answered "I don't think so." App. G, 514-16.

Smith's zigging and zagging was cut off and he was excused for cause after the following still-equivocal colliquoy:

> **COURT:** At this time, can you say that your mind is closed to the question of the death penalty?
>
> **MR. SMITH:** In this case, yes, sir.
>
> **COURT:** In this case it is?
>
> **MR. SMITH:** Yes, sir.
>
> **COURT:** And by that you mean, then, regardless of the evidence in the case, how strong it might be or how bad it might appear, you could not vote for the death penalty?
>
> **MR. SMITH:** I don't think so.

App. G, 516 (emphasis added). Defense counsel's second request to question the juror was refused at this point, and Smith was excused for cause over defense objection. App. G, 516-17. Notably, nearly all of the prospective jurors had read about the offense in the newspaper and knew that "this case" involved a single-victim domestic homicide. E.g., T. 56-63, 130-37, 209-13, 290-92, 318-19, 355-59, 393-94, 444, 455, 467; M.T. 26-36; D.M.X. 1, 2. By the time Smith was questioned he had also heard similar facts discussed in the voir dire E.g., T. 101, 129, 195.[64]

[64] The pattern preceding the excusal of juror Arrington was similar. In answer to Question 1, Arrington stated that he considered the death penalty "a necessary law all right" but said he "would be hesitant to invoke it." App. H, 24. Asked if he had "any religious or moral scruples against ... the death penalty," he answered "to a certain extent, yes." Id. The prosecutor then asked Question 2B "I take it then that ... you are unwilling to consider the death penalty and vote to impose it in this particular case," to which Arrington answered "that's right." Id. The court then asked thrice whether Arrington "agree[s] with the

Witherspoon v. Illinois, supra holds that the State may only exclude for cause "those prospective jurors who state[ ] in advance of trial that they would not ever consider returning a verdict of death." 391 U.S. at 520 (emphasis added). Lest it produce a jury that "can speak only for a distinct and dwindlingly minority" and one "uncommonly willing to condemn a man to die," the State may not "cull" the jury "of all who harbor doubts about the wisdom of capital punishment ...." Id.

> [S]o, too, [prospective jurors] cannot be excluded for cause simply because they indicate there are some kinds of cases in which they would refuse to recommend capital punishment.... The most that can be demanded of a venireman in this regard is that he be willing to consider all the penalties ..., and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances.

Id. at 522 n.21 (emphasis in original). Accord, e.g., Adams v. Texas, 448 U.S. 38, 44 (1980); Boulden v. Holman, 394 U.S. 478, 482 (1969). Accordingly, excusal is improper unless the juror first "ma[kes] unmistakably clear" that he "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed ...." Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21 (emphasis in original).

Mr. Boyd's sentence was imposed at trial and affirmed by the North Carolina Supreme Court in conflict with these principles. First, particularly given the denial of defense questioning, the prosecutors' inaccurate and inexorably leading questions were every bit as effective as the questions disapproved in

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[capital punishment] law of this State," to which he first answered "It's necessary in a lot of circumstances; but --[answer interrupted]," then (twice) "I'm not sure." App. H, 24-25. The judge explained the law again, and a fourth, fifth and sixth time asked if Arrington "agree[d] with that law," to which Arrington thrice answered "I don't think so." App. H, 25-26. The judge immediately thereafter asked "And regardless of the evidence, however strong it might be, you say you could not and would not vote for the death penalty," to which Arrington answered "No, sir." After denying defense counsel's request to question the venireman, the judge then struck Arrington. App. H, 26.

Witherspoon at "cull[ing] ... all who harbored doubts about the wisdom of capital punishment." Id. at 510. Every prospective juror who admitted having even "some extent" (App. H, 24) of conscientious scruples against the death penalty was struck for cause.[65]

Second, given the specific questions asked prospective jurors Smith and Garland, their voir dire could at most have revealed, insufficiently under Witherspoon, that "there are some kinds of cases in which they would refuse to recommend capital punishment"[66] -- i.e., in single-victim domestic-homicide situations such as "in this case." App. G, 516; App. H, 24. Indeed, Witherspoon explicitly disapproves the would-you-impose-death-in-this-particular-case questions asked the veniremen here, because "a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21. See id. at 515 n.9.

Finally, even in answer to the prosecutors' improperly situation-specific questions, Smith and Garland did not express the degree of certainty required by Witherspoon. Individually and collectively, the vacillating answers given by each venireman -- e.g., "I don't know;" "It's possible," "I don't think so," "I don't understand," "I'm not sure about that" -- were equivocal and made nothing "unmistakably clear," much less their "irrevocabl[e]" and "automatic[]" opposition to "ever" imposing death. Id. at 420, 522 n.21.[67] Accord, Witt v. Wainwright, 714 F.2d

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[65] Just as in Witherspoon, "the prosecution" here used "death qualification" voir dire to "eliminate[ ] nearly half the venire of prospective jurors." 391 U.S. at 513.

[66] Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21.

[67] Striking the jurors without permitting defense questioning may have substantially masked the veniremen's actual degree of equivocation, because it allowed the State to choose which item in a vacillating and as a whole uncertain series would be the "last" and thus, assertedly, the "truest" response. See Schnapper, supra n.63, at 1017, 1027-32. Schnapper's review of the cases reveals a significant number of prospective jurors who, if permitted to complete the process of understanding the "death qualification" inquiry and formulating their response, will

1069, 1082-83 (11th Cir. 1983), revised and rehearing denied, 723 F.2d 767 (1984), cert. granted, ____ U.S. ____, 80 L.Ed.2d 551 (1984).

Witherspoon and the North Carolina Supreme Court's decision below accordingly conflict. The Court should grant certiorari to resolve that conflict.

The decision below also conflicts with several decisions of the United States Courts of Appeals for the Fifth and Eleventh Circuits and with decisions of a number of state courts on four questions subsumed in Mr. Boyd's case, i.e., whether the Witherspoon principle permits: (1) the prohibition of defense questioning;[68] (2) voir dire questions that inexorably lead prospective jurors from expressing scruples against the death penalty to saying that they could never impose the punishment even if the law requires it;[69] (3) the excusal of prospective jurors for cause based on questions (or answers) which merely reveal that they would not impose death in "this," but not necessarily all,

[68] The lower courts are sharply divided over the propriety of forbidding defense questions. One state court has found the practice reversible error. Hobbs v. State, 617 S.W.2d 347, 349 (Ark. 1981). Another state court has held the practice to be error but not reversible so long as the juror first unequivocally says he could never impose death. White v. State, 629 S.W.2d 701, 706 (Tex. Crim. App. 1981); Burns v. State, 556 S.W.2d 270, 278 (Tex. Crim. App. 1977). Two other courts have held that the practice is within the trial court's discretion. People v. Nye, 455 P.2d 395 (Cal. 1969), cert. denied, 406 U.S. 972 (1972); Geary v. Commonwealth, 503 S.W.2d 505, 509 (Ky. 1972).

[69] Decisions disapproving such questions are: Hobbs v. State, 617 S.W.2d 347, 349, 352 (Ark. 1981), and Pankey v. Commonwealth, 485 S.W.2d 513, 519 (Ky. 1972)(dicta; conviction reversed on other grounds).

capital cases;[70] and (4) the excusal of prospective jurors for cause whose "I don't think so" answers do not make their position unmistakeably clear.[71] The Court should grant certiorari to resolve these conflicts as well.

[70] Three state courts of last resort have held that excusal for cause based on unequivocally negative answers to the question whether the juror could impose death in the particular case before them is improper. Lewis v. State, 268 S.E.2d 915, 918 (Ga. 1980); Monserate v. State, 271 N.E.2d 120, 123 (Ind. 1971); State v. Holland, 283 A.2d 887, 902 (N.J. 1971); see also People v. Velasquez, 606 P.2d 341, 347-50 (Cal. 1980), vacated and remanded on other grounds, 449 U.S. 903 (1980), on remand, 622 P.2d 952 (Cal. 1981).

The Fifth Circuit en banc recently split 6-5 on the propriety of asking only whether the juror could impose death in "this particular case." Williams v. Maggio, 679 F.2d 381, 385-86 (5th Cir. 1982)(Unit A)(en banc); id. at 398 (Randall, J., dissenting). Moreover, five recent Fifth and Eleventh Circuit decisions have disapproved death qualification questions that do not unmistakeably call upon prospective jurors to reveal that they would never impose death under any circumstances. Darden v. Wainwright, 725 F.2d 1526, 1530-31 (11th Cir. 1984)(en banc); Witt v. Wainwright, supra, 714 F.2d at 1082; Alderman v. Austin, 683 F.2d 554, 562-64 (5th Cir. 1982) Unit B, reinstated, 695 F.2d 124 (5th Cir. 1983) Unit B (en banc); Granviel v. Estelle, 655 F.2d 673, 677 (5th Cir. 1981); Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980)(en banc).

[71] Excusals were ruled improper in the following cases based on "I don't think so" or similar answers: Witt v. Wainwright, supra, 714 F.2d at 1082; Nance v. Zant, 696 F.2d 940, 955 (11th Cir. 1983); Granviel v. Estelle, 655 F.2d 673, 677 & n.7 (5th Cir. 1981); People v. Lanphear, 608 P.2d 689, 703-04 (Cal. 1980), vacated on other grounds, 449 U.S. 810 (1980); Blankenship v. State, 277 S.E.2d 505, 509 (Ga. 1981); see also Swindler v. State, 569 S.W.2d 120, 131-32 (Ark. 1978)(Howard, J., concurring). Decisions in conflict with the above cases are: State v. Mercer, 618 S.W.2d 1, 7 (Mo. 1981); State v. Avery, 261 S.E.2d 803, 810 (N.C. 1980); State v. Elliot, 267 N.E.2d 806, 808 (Ohio 1971); White v. State, 521 S.W.2d 104, 108-09 (Tex. Crim. App. 1976).

Although the North Carolina Supreme Court did not so state in its opinion (and the State did not so argue in its brief), that court may have upheld Mr. Boyd's death sentence despite juror Smith's improper exclusion on the ground that Smith was excluded from the pool of possible alternate jurors. If so, the decision below further conflicts with Nance v. Zant, supra at 956 ("the state['s] argu[ment] that even if [the juror's] exclusion was a Witherspoon violation it was harmless error because she was excluded only from a pool of alternate jurors ... is precluded by Davis v. Georgia, 429 U.S. 122, 123 (1976) (per curiam)").

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

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APPENDIX

EDITOR'S NOTE

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NO. 84-5819

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ARTHUR MARTIN BOYD, JR.,

Petitioner,

-v-

THE STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NORTH CAROLINA

APPENDICES

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APPENDIX A

determined on direct appeal as of the certification date of this decision. It may not be used as the basis for collaterally attacking any case which has been finally determined on direct appeal or in which no appeal was taken from the trial judgment. We think this fairly balances those considerations calling for the adoption of the new rule against any adverse impact upon the administration of justice caused by its adoption.

In applying our new rule retroactively to all cases which have not been finally determined on direct appeal as of the date on which this opinion is certified, we will examine each appeal on a case-by-case basis to determine if the error was reversible, i.e., whether a reasonable possibility exists that a different result would have been reached at the trial had the evidence not been erroneously admitted. The use of this harmless-error analysis will allow us to correct errors in which the truth-seeking process was tainted by the hypnotically refreshed testimony while imposing minimal adverse impact on the administration of justice.

VII.

[10] In this case, the testimony by Detective Simmons regarding the hypnotic session and the admission and playing before the jury of the video tape of the witness Miller during the hypnotic session were inadmissible under the rules we today announce. Yet they constituted a major portion of the state's case. Miller was, by his own admission, an accomplice of defendant. His testimony, after undergoing hypnosis for the purpose of refreshing his recollection, was a large part responsible for defendant's conviction. Since Miller's statements made before the hypnotic session was not proffered at trial nor is it contained in the record on appeal, none of his testimony was admissible under the rules we today announce. The video tape of the hypnotic session strengthened the credibility of his testimony in the eyes of the jury. It gave an unwarranted aura of reliability to his testimony. These erroneous admissions taken together constitute reversible error because a reasonable possibility exists that a different result would have been reached had this evidence not been admitted at defendant's trial. N.C.Gen.Stat. § 15A-1443(a). We therefore reverse the decision of the Court of Appeals and remand this case to that court for further remand to the superior court where defendant will be given a new trial to be conducted under the rules we today announce.

REVERSED and REMANDED.

STATE of North Carolina
v.
Arthur Martin BOYD, Jr.
No. 177A85.
Supreme Court of North Carolina.
Aug. 28, 1984.

Defendant was convicted in the Superior Court, Surry County, Edward K. Washington, J., of first-degree murder and sentenced to death, and he appealed. The Supreme Court, Copeland, J., held, inter alia, that: (1) prosecutor's remarks during closing argument as to how jury would respond to witnesses, prosecution, victim, victim's parents and daughter if verdict was for less than first-degree murder were not such a gross impropriety as to have required the court to act ex mero motu; (2) exclusion of criminologist's testimony concerning defendant's stressful life events and criminal homicide was not error; (3) allegedly improper remarks made by prosecutor at conclusion of sentencing phase of the trial did not entitle defendant to a new sentencing hearing; (4) trial judge correctly instructed jury on mitigating circumstance that defendant was under the influence of mental and emotional disturbance;

(5) trial judge did not express his opinion on credibility of defendant's witnesses and evidence while instructing jury on mitigating factors, so as to deprive defendant of a fair sentencing determination; and (6) sentence of death was neither excessive nor disproportionate.

No error.

Exum, J., dissented as to sentence and filed an opinion in which Martin, J., joined.

1. Criminal Law ⇐717, 720(1, 6)

A prosecuting attorney may argue vigorously all facts in evidence, the law raised by the issues, and any inferences arising therefrom.

2. Criminal Law ⇐719(3)

A prosecutor may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence.

3. Criminal Law ⇐657(1)

A jury's decision must be based solely on the evidence presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general.

4. Criminal Law ⇐1037.1(2)

Where defendant in prosecution for first-degree murder fails to object at trial to a prosecutor's closing remarks regarding jury's accountability to witnesses, to the victim, to the community, and to society in general, Supreme Court must determine whether the remarks amount to such gross impropriety as to require the trial judge to act ex mero motu.

5. Criminal Law ⇐728(2)

Prosecutor's remarks in prosecution for first-degree murder regarding jury's accountability to witnesses, to victim, to victim's parents and daughter, to the community, and to society in general did not rise to the level of such gross impropriety as to require ex mero motu action by the trial judge.

6. Criminal Law ⇐1171.1(6)

Any impropriety in prosecutor's remarks, in prosecution for first-degree murder, regarding jury's perceived accountability to witnesses, to victim, to victim's parents and daughter, and to the community was not prejudicial, in view of ample support in the record for defendant's first-degree murder conviction despite the improper remarks.

7. Criminal Law ⇐1171.1(3)

In the absence of a showing of prejudice, prosecutorial misconduct in the form of improper jury argument does not require reversal.

8. Criminal Law ⇐986.6(2)

In determining whether a criminologist's testimony was erroneously excluded at sentencing phase of defendant's trial for first-degree murder, as bearing on factors in mitigation, Supreme Court's inquiry is twofold: whether the tendered evidence was relevant, and whether defendant demonstrated the existence of patent, prejudicial error by its exclusion.

9. Criminal Law ⇐986.6(2)

Criminologist's testimony concerning stressful life events defendant suffered, offered as mitigating evidence in penalty phase of defendant's trial for first-degree murder, was properly excluded, in view of fact that stressful events described by criminologist, including defendant's loss of freedom due to incarceration, his inability to hold a job, and his problem maintaining friendships, offered little as factors which would extenuate or reduce moral culpability of the killing, and in view of fact that each of the stressful events was presented to the jury in considerable detail through testimony of the defendant, his mother, and other witnesses.

10. Criminal Law ⇐722.1

Prosecutor's remarks impugning character of defendant in penalty phase of defendant's prosecution for first-degree murder, and credibility of both defendant and his witnesses, were based upon evidence or inferences properly drawn from the evi-

dence, and thus, did not entitle defendant to a new sentencing hearing.

11. Criminal Law ⇐723(9)

Prosecutor's comment, in penalty phase of prosecution for first-degree murder, concerning coincidence between defendant's age and fact that defendant inflicted 37 stab wounds, that obviously the factor had been proved and had to be considered but that it should be given no weight, was within the allowable limits of argument, when taken in context of prosecutor's careful discussion of each of the mitigating factors, together with instructions by the trial judge.

12. Criminal Law ⇐723(1)

Certain biblical quotations made by prosecutor in penalty phase of defendant's trial for first-degree murder, including statement that the Bible is "maybe * * * the very best law book we have got," were not grossly improper in context, in view of defendant's propensity to quote the Bible in his defense.

13. Criminal Law ⇐717

Portion of a case quoted by prosecutor at penalty phase of defendant's trial for first-degree murder, which case was later overruled, did not form the rationale of the decision in that case to the extent that the prosecutor was prohibited from referring to it in his argument, but rather, was an argument relating to the need for the death penalty for its value as a deterrent.

14. Criminal Law ⇐723(1)

Portion of defense counsel's argument at penalty phase of defendant's prosecution for first-degree murder, in which defense counsel stated to the jury that they were the legal machinery that puts a man to death, and which then went on to describe physical effect of death in the gas chamber on the body, was irrelevant, and highly improper.

15. Homicide ⇐311

Trial court which instructed jury in penalty phase of prosecution for first-degree murder that it could, but was not compelled to, answer "yes" or "no" to each of the mitigating factors that were submitted, but was required only to indicate whether it found one or more mitigating factors to exist, properly instructed the jury on how it was to consider mitigating factors.

16. Criminal Law ⇐1026.1(6)

Trial court's use of the word "could," rather than mandatory "would" or "should," in instructing the jury on mental or emotional disturbance as a mitigating factor in penalty phase of prosecution for first-degree murder, was not so serious as to amount to plain error.

17. Criminal Law ⇐1026.1(6)

Trial court's use of word "faculties," in instructing jury on mental and emotional disturbance as a mitigating circumstance in defendant's prosecution for first-degree murder, did not amount to plain error, in view of fact that trial judge had, earlier in the instruction, clearly defined mental or emotional disturbance, concluding that "it is enough that defendant's mind or emotions were disturbed from any cause," and that he was under the influence of a disturbance when he killed the victim.

18. Criminal Law ⇐1172.9

Trial judge's statement, in instructing jury on nonstatutory mitigating factor in prosecution for first-degree murder that defendant had lived with the deceased and desired a reconciliation, in which the judge stated to the jury that it would recall testimony presented by the victim's parents as to events occurring in that connection "with regard to whether or not there was a genuine desire for reconciliation at that time," did not negate all of defendant's efforts to convince the jury of his genuine feelings of love, frustration, deep sense of loss and inability to cope with reality of losing the victim, so as to constitute prejudicial error.

19. Homicide ⇐311

Statement by trial judge in instructing jury on defendant's mitigating factors that he had expressed a devotion to God and had been baptized, in prosecution for first-

degree murder, in which trial judge stated what defendant and the State had said and contended, including State's statement that the jury should be very skeptical and scrutinize the testimony very carefully because defendant himself testified that he had made a false confession at an earlier time in an effort to get the victim back, was an accurate statement of the evidence and the contentions of the parties, and thus, not a basis for objection.

20. Homicide ⇐311

Trial court's instruction, in prosecution for first-degree murder, on mitigating factor that defendant sought help from others, did not disclose error, favoritism toward one party or the other, or any form of judicial opinion, so as to deprive defendant of a fair sentencing determination.

21. Homicide ⇐311

Trial judge's instruction on defendant's addiction to drugs and alcohol, offered as a mitigating factor in sentencing for first-degree murder, did not constitute an expression of opinion on credibility of defendant's evidence, so as to deprive defendant of a fair sentencing determination.

22. Homicide ⇐311

Trial court's instruction to jury, in prosecution for first-degree murder, which tied in defendant's loss of his father and grandfather at an early age with defendant's mental state was proper, in view of fact that defense counsel, during final argument, made a similar argument.

23. Criminal Law ⇐1172.9

Failure of trial court, in sentencing phase of prosecution for first-degree murder, to instruct jury that State had burden of proving beyond a reasonable doubt that aggravating circumstances substantially outweighed the mitigating circumstances sufficiently to call for the death penalty and instead instructing jury that it must return a verdict of death if it found that aggravating factors outweighed the mitigating factors, did not constitute either constitutional or prejudicial error.

24. Jury ⇐131(2.1)

Death qualifying the jury prior to guilt phase in defendant's prosecution for first-degree murder did not deny defendant a fair trial.

25. Jury ⇐108

Exclusion of two jurors in prosecution for first-degree murder based on their express opposition to and refusal to apply the death penalty was proper.

26. Homicide ⇐311

Trial court, in prosecution for first-degree murder, did not err in failing to inform jury during penalty phase that if it was deadlocked a life sentence would be imposed.

27. Homicide ⇐311

Aggravating factor of "especially heinous, atrocious or cruel," used in penalty phase as a factor in determining whether a death sentence should be imposed for conviction of first-degree murder, is not unconstitutionally vague. G.S. § 15A-2000(e)(9).

28. Constitutional Law ⇐268(11)

Defendant in prosecution for first-degree murder was not denied due process by trial court's failure to instruct jury that the State had burden of proving the nonexistence of each mitigating circumstance beyond a reasonable doubt, or by fact that trial court placed burden on defendant to prove each mitigating circumstance by a preponderance of the evidence.

29. Homicide ⇐331

Capital murder statute is constitutional. G.S. § 15A-2000.

30. Homicide ⇐334

Sentence of death imposed on defendant convicted of first-degree murder was neither excessive nor disproportionate to penalty imposed in similar cases considering both the crime and the defendant, where there was overwhelming evidence of defendant's guilt and scanty evidence of emotional or mental disorder when, together with defendant's significant history of criminal convictions and heinous nature of the crime, including suffering of the

victim, provided basis for a penalty of death. G.S. § 15A-2000.

Before Washington, J. at the 14 March 1983 Criminal Session of Superior Court, Surry County, defendant was convicted of first degree murder and sentenced to death, from which sentence he appeals as a matter of right. N.C.Gen.Stat. § 7A-27(a). This case was heard in the Supreme Court on 10 May 1984.

Defendant was tried for and convicted of the first degree murder of Wanda Phillips Hartman. The victim died as a result of thirty-seven stab wounds inflicted by the defendant. Numerous individuals, including the victim's mother and young daughter, witnessed the murder which occurred outside a shopping mall on the afternoon of Saturday, 7 August 1982. Because the evidence at trial pointed unerringly to the defendant as the perpetrator of the crime, the focus at the guilt phase of the trial was whether the evidence was sufficient to support a conviction of first degree murder on the theory of premeditation and deliberation. Defense counsel argued forcefully that if guilty, defendant could at most be convicted of second degree murder. Also because of the overwhelming evidence of defendant's guilt, defense counsel has prudently raised and argued only one assignment of error respecting the guilt phase of the trial: whether the defendant was deprived of his right to a fair trial by jury as a result of the prosecutor's argument "which sought a conviction of first degree murder on the basis of passion and prejudice rather than the evidence offered at trial." As our discussion of the facts will reveal, although we do not approve of the prosecutor's remarks, the evidence at trial was more than sufficient to support a conviction for first degree murder. Therefore defendant has failed to show prejudice by any impropriety particularly as he failed to object during the argument.

Defendant's remaining assignments of error relate to the sentencing phase of his trial. These include numerous assignments of error on issues previously resolved by this Court against the defendant and which have been raised to preserve these issues for further appellate review. In addition, defendant challenges the trial court's exclusion of certain testimony relating to his mental condition, the prosecutor's remarks during argument to the jury, and the instructions on mitigating factors.

Upon our careful reading of the trial transcript and upon full consideration of the arguments set forth in the briefs, we find that no prejudicial error occurred at either the guilt phase or the sentencing phase of defendant's trial. We therefore affirm the conviction of first degree murder and the sentence imposed thereon.

In order to address the assignments of error raised on this appeal, it is necessary to set out a full and detailed statement of the facts.

The defendant had known the victim for approximately three years during which time they had lived together. They had separated several months prior to the murder when the victim and her daughter moved into the home of the victim's parents. The defendant returned to his wife and children while at the same time attempting a reconciliation with the victim. On the morning of Saturday, 7 August 1982, defendant was seen drinking at a local tavern. He then took a taxi to the Mayberry Shopping Mall in Mount Airy where he bought a lock-blade knife, the murder weapon. He met the victim coming out of a store accompanied by her mother and daughter. He followed the victim to a nearby bank where a local church group was conducting a car wash. The victim's father was the pastor of the church. Witnesses, including the man who sold defendant the knife, described the defendant as calm, polite and not intoxicated. He told one witness that he had "never felt better in his life" and shook hands with the victim's father, stating that he had no hard feelings. This latter remark was apparently in reference to the fact that the victim's father had earlier in the week ordered defendant from his property after which a trespassing warrant had been issued. Defendant and the victim then sat on the curb in front of the bank and talked quietly for some period of time until the victim's mother stated that they had to leave. As the victim stood up, the defendant stood in front of her and asked that she talk to him a little longer. The victim stated that they had nothing further to discuss and that if the defendant was going to kill her, "he should hurry up and get it over with." Of significance was the fact that approximately one week prior to the murder, during a confrontation with the victim's father, defendant turned to the victim and stated "I'll see you like a German submarine, when you are not expecting it." Defendant reached into his pocket, pulled out the knife and assured the victim that he wasn't going to hurt her. He immediately drew back the knife and stabbed her. The victim fell to the ground and the defendant continued to stab her as rapidly as he could. At one point the victim's mother managed to pull the defendant away from her daughter. Defendant, however, pushed the 78 year old woman aside, held the victim by her hair, and continued to stab.

One of the eyewitnesses, a member of a Virginia County Sheriff's Department who was visiting Mount Airy with his son, followed the defendant on foot after the murder. He watched as the defendant walked slowly and nonaggressively from the crime scene toward the back of the shopping mall. Defendant removed his bloodstained shirt, wiped the blood from his hands, and put the shirt into his back pocket. Defendant eventually reached an embankment, turned, and headed for the mall parking lot as a Mount Airy police car reached the scene. Defendant tossed the knife under a parked car and attempted to conceal himself between other cars. He was apprehended and arrested.

The testimony indicated that the victim suffered considerable pain prior to her death. When the emergency medical unit arrived at the scene at 2:33 p.m., she was "raking [her hands] back and forth in the dirt," and repeatedly complained of an inability to breathe. She was taken to a local hospital for emergency treatment and then sent by ambulance to Baptist Hospital in Winston-Salem. She died en route at 3:46 p.m. The examining pathologist testified that he identified thirty-seven stab wounds to the neck, chest, left arm, left thigh, back, and each hand, that included two penetrating wounds to the right lung, three to the left lung, one to the stomach and one to the omentum. The wounds to the hands and arm were classified as defensive wounds—"incision wounds which are produced when the victim extends its arms in an effort to defend himself." The victim died of exsanguination caused by multiple stab wounds, leading to hypovolemic shock.

Defendant did not testify at the guilt phase of his trial. He presented three witnesses in an effort to prove he was intoxicated at the time of the murder. Two friends testified that defendant spent the morning at Martin's Place, during which time he allegedly consumed much beer, some whiskey and took some unidentified type of pill, variously described as "heart-shaped" or a large "black capsule" which the defendant removed from his hat. The bartender, however, did not recall seeing the defendant wearing any hat, and testified that defendant left the tavern at 9:30 a.m., soon after he had arrived. The bartender did testify that when defendant returned shortly after noon, she refused to serve him because he appeared to be intoxicated.

At the sentencing phase of the trial, the defendant testified on his own behalf and offered the testimony of a number of preachers who had witnessed defendant's religious rebirth, and his mother who testified concerning defendant's distressing childhood. The thrust of this testimony was that defendant's father abandoned the family when defendant was a child. Then, defendant's grandfather, to whom he looked as a father figure, died. This event was likened to a dog losing its master. Defendant had a history of alcohol abuse. From the age of 14 the defendant had either been in prison, on parole, or on probation for crimes including injury to property, nonsupport, 7 convictions for larceny,

assault with intent to commit rape on a fourteen year old girl, driving under the influence, assault on an officer, and resisting arrest. Prior to the murder he was on an antabuse program which required him to take a pill before a magistrate each day. He voluntarily stopped the program the day before the murder.

The defendant loved the victim and attempted in every way he could to effect a reconciliation. He had read her diary and knew she was seeing another man. He talked to her for two hours on the telephone on the morning of the murder and knew she would be at the Mayberry Mall for the carwash. In violation of his probation, he had been arrested for driving under the influence earlier in the week and had consulted his attorney the day before the murder. He recalled the details of his activities prior to and following the murder, but did not recall the actual murder.

On Tuesday, 21 December 1982, at 8:30 p.m. defendant experienced a religious awakening. He was permitted to leave prison for his baptism which took place on 16 January 1983 at Holder's Bottom. He has since become an ardent student of biblical literature and was described by one of the preachers who testified on his behalf as "smart. A lot of people don't know how to be saved, and he does." Defendant testified that Jesus Christ "picked me up out of the bug pen," and that "[w]hat you see sitting right here in front of you is sin." "I am guilty, all right, but I have been forgiven for that sin, and that's satisfied me." Twice, each time prior to when the case was scheduled for trial, defendant wrote the victim's father asking for forgiveness and in one letter stated "The D.A. has asked for my life to be taken away. I'm worried about that,—I do not think that would make anyone feel better."

Against this background, defendant attempted to introduce at the sentencing phase the testimony of Jack Humphrey, co-author of a report entitled, "Juvenile Life Events and Criminal Homicide." Following the State's objection, the trial judge conducted a voir dire hearing which disclosed the following: The witness teaches criminology at U.N.C.-Greensboro. The witness had reviewed the prison records, social histories and psychiatric histories collected by the Department of Corrections for inmates over a two-year period. The study involved approximately 272 violent offenders and 181 felonious property offenders (non-violent offenders). The report concluded that homicide offenders tend to experience more stressful events than do non-homicide offenders over the course of their lifetime prior to the commission of the crime. In addition, people who tend to kill those close to them tend to experience more loss in their lives than those who kill strangers. "The more loss in someone's life, the more likely they are to become self-destructive. And it seems that killing a family member or killing a close friend is an act of self-destruction." The witness then described the types of "losses" which can be experienced:

1) Loss of a parent or sibling
2) Loss of a student role—being expelled from school
3) Loss of friends
4) Loss of job
5) Loss of liberty—being incarcerated

The witness had interviewed the defendant and concluded that "what was true of the group of people who had killed someone close to them was especially true of Mr. Boyd." The defendant's father had abandoned the family; he had lost his grandfather; he was unable to keep a job; he had been incarcerated; he had five friends and those he had he kept losing.

Defense counsel argued that the testimony would give "some credence to the submission to the jury of any mitigating circumstance involving Mr. Boyd where he lost his father at an early age and he lost his grandfather at an early age." However, following the voir dire hearing, the trial judge excluded this evidence.

Following the presentation of evidence at the sentencing phase, the court submitted as factors in aggravation N.C.Gen.Stat. § 15A-2000e(5), that the defendant had

been previously convicted of a felony involving the use or threat of violence to the person; and N.C.Gen.Stat. § 15A-2000e(9), that the murder was especially heinous, atrocious, or cruel. The jury answered these issues in the affirmative and found that the aggravating factors were sufficiently substantial to call for the imposition of the death penalty. The jury was asked to consider the following mitigating factors:

(1) That the murder was committed while Arthur Marvin Boyd, Jr. was under the influence of mental or emotional disturbance.

(2) The capacity of Arthur Marvin Boyd, Jr. to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

(3) The age of the defendant at the time of the crime.

(4) The defendant had lived with the deceased and at the time of the death of the deceased desired a reconciliation.

(5) The defendant has since the commission of the crime expressed remorse over the death of the deceased.

(6) The defendant knew and cared for the deceased.

(7) The defendant has since the commission of the offense asked the father of the deceased to forgive him.

(8) The defendant has since the commission of the offense expressed a devotion to God.

(9) The defendant has since the commission of the offense been baptized.

(10) The defendant suffered the loss of his grandfather at an early age in life.

(11) The father of the defendant abandoned the family at an early age in the life of the defendant.

(12) The defendant sought help from others before the commission of the crime.

(13) The defendant was addicted during most of his adult life to drugs and alcohol.

(14) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury did not indicate which mitigating circumstance it did or did not find, but affirmatively indicated that it found one or more. Finally, the jury found that the aggravating circumstances outweighed the mitigating circumstances and recommended a sentence of death.

Rufus L. Edmisten, Atty. Gen., by Charles M. Hensey, Asst. Atty. Gen., Raleigh, for the State.

Ann B. Petersen, Raleigh, and James R. Glover, Chapel Hill, Asst. Appellate Defenders, and Michael T. Rayvner, Pilot Mountain, for the defendant-appellant.

COPELAND, Justice.

GUILT PHASE

I.

Defendant first contends that he was denied a fair trial as a result of the prosecutor's remarks during closing argument at the guilt phase of the trial. He points specifically to the following statements:

... the reality of this case hit me.

We are talking about real people. By your verdict in this matter you are going to be saying to these real people what you think of what you have heard here this week. Your decision is going to tell these people what you think of what you heard here.

There are several people you will be answering to. What will you say to the people in this County about what you have heard? What will you say about all those citizens out there in Surry County about what you have heard here this week? Will you say, "Okay, if it happened down there at Mayberry Mall on a Saturday"? Will you say "Okay"?

The prosecutor then went on to ask how the jury would respond to the witnesses, the paramedics, the victim, her parents and her daughter if its verdict was for less than first degree murder.

[1-3] As we most recently stated in *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197 (1984), a prosecuting attorney may argue vigorously all facts in evidence, the law raised by the issues, and any inferences arising therefrom. However, the prosecutor "may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." Id. at —, 316 S.E.2d at 205. From this it follows that the jury's decision must be based solely on the evidence presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general.

[4-7] The defendant, however, failed to voice any objection at trial to the prosecutor's closing remarks. Therefore, this Court must determine whether the remarks amounted to such gross impropriety as to require the trial judge to act ex mero motu. *See State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197. Following a thorough review of the contested argument, we find that while we do not approve of the prosecutor's remarks, they do not rise to the level of such gross impropriety as to have required ex mero motu action by the trial judge. Furthermore, the record provides ample support for the defendant's first degree murder conviction despite the improper remarks. Therefore, any impropriety in the remarks was not prejudicial. In the absence of a showing of prejudice, prosecutorial misconduct in the form of improper jury argument does not require reversal. *See United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (lower court erred in reversing conviction apparently on the basis that it had the supervisory power to discipline prosecutors for continuing violations of rule banning comment on accused's failure to testify, regardless of whether prosecutor's arguments constituted harmless error). *See also State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976); *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

PENALTY PHASE

II.

Defendant contends that the trial court's exclusion of Dr. Humphrey's testimony concerning stressful life events and criminal homicide constituted prejudicial error. Defendant argues, *inter alia* that "[t]he purpose of Doctor Humphrey's testimony was to link together all of the defendant's mitigating evidence into a unified whole which explained the apparent contradiction of killing the person the defendant loved the most." The defendant intended to show, through Dr. Humphrey's testimony, that the killing was "primarily a depression caused self-destructive act, closely related to the impulse that leads to suicide, resulting from a life history of an inordinate number of losses beginning with the abandonment by the defendant's father and the death of his grandfather and culminating with the threatened loss of Wanda Hartman." Defendant concludes that:

> Without the glue, the entire structure of the defendant's theory of mitigation was shattered into little pieces. Presented only as broken bits, there was virtually no hope that the defendant could convince the sentencing jury that his was a case arising out of the "frailties of human kind" which called for compassion and mitigation of the ultimate penalty of death.

The State argues that evidence of stress, as defined by an accumulation of "losses," most of which are merely manifestations of anti-social behavior, while perhaps resulting in crimes of violence, is of no mitigating value.

In its brief, the State comments that:

> The most Dr. Humphrey's study showed was that stress often times produces violent behavior in susceptible individuals and that persons incarcerated in the North Carolina Prison System for violent crimes have histories of more stress than those incarcerated for non-violent crimes..... It is common knowledge that millions of individuals have been subjected to some or all of the stresses inflicted upon defendant without becoming murderers. Many people lose their fathers and grandfathers at an early age and later in life experience marital problems or are rejected by a spouse or other loved one without becoming murderers. The stresses to which defendant was subjected were no more or less than those inflicted upon the population in general by life; the fact that he was weak and succumbed to those stresses hardly reduces his moral culpability or demonstrates that he is a less worthy candidate for capital punishment than another. Rather clearly the evidence shows a weak individual; the product of an alcoholic father who deserted his family and a less than stable mother; who had gone to prison by the time he was seventeen years of age; who, in the ensuing twenty years, never kept a job for a year while being convicted of twelve crimes; who was taken to church regularly as a child but when not in prison, was high most of the time on drugs and alcohol and who spent all of his time in a pool hall as a hustler and crappie.

[8] In determining whether Dr. Humphrey's testimony was erroneously excluded at the sentencing phase of defendant's trial as bearing on factors in mitigation, our inquiry is two fold: (1) whether the tendered evidence was relevant, and (2) whether defendant has demonstrated the existence of "patent, prejudicial error" by its exclusion. *State v. Peach*, 306 N.C. 1, 292 S.E.2d 203 (1982). In this regard, we stated in *Peach* that:

> Defendant's contentions must be examined against the backdrop of our capital punishment statute which provides, in conformity with the constitutional mandates of the Eighth and Fourteenth Amendments, that any evidence may be presented at the separate sentencing hearing which the court deems "relevant to sentence" or "to have probative value," including matters related to aggravating or mitigating circumstances. G.S. 15A-2000(a)(3); *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation; however, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation. *See State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979); *State v. Cherry*, 298 N.C. 86, 98-99, 257 S.E.2d 551, 559 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). *See also State v. Goodman*, 298 N.C. 1, 30-31, 257 S.E.2d 569, 588 (1979). Consequently, we believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error.

Id. at 19, 292 S.E.2d at 219.

A mitigating circumstance has been defined as:

> "a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder which may be considered as extenuating, or reducing the moral culpability of killing or making it less deserving of the extreme punishment than other first-degree murders."

State v. Brown, 306 N.C. 151, 176, 293 S.E.2d 569, 586 (1982).

[9] We note first that Dr. Humphrey's report consists of only nine pages of narrative, three statistical charts, and three pages of references. The report in the final paragraph of the summary states:

> Support and qualification has been found for the link between stressful life events and criminal homicide. The findings also show that the type of stress typically experienced by the offender tends to influence his choice of victim.

In short, the report lacks comprehensiveness and is characterized by generic con-

clusions of questionable scientific import or value in mitigation. In fact, the pertinent information we have concerning the details of the scientific and statistical methods which Dr. Humphrey and his co-author employed were gleaned from a thorough cross-examination of the witness during voir dire. Furthermore, the "stressful events" described by the witness as pertaining to the defendant—his loss of freedom due to incarceration, his inability to hold a job, and his problem maintaining friendships—offer little as factors which would extenuate or reduce the moral culpability of the killing. Nevertheless, each of these stressful events was presented to the jury in considerable detail through the testimony of the defendant, his mother, and other witnesses. Basically, defendant's entire life history was before the jury, including information about his alcoholic father, the death of his grandfather, his work history, his criminal history, his marital history, and his history of drug and alcohol abuse, together with his eventual religious conversion. Dr. Humphrey's testimony would have placed these various "stressful events" in a context suggesting that defendant's act in murdering Wanda Hartman was predictable. The report merely constructs a profile of a murderer into which the defendant fits. The fact that the defendant's life history typifies that of a man likely to murder a family member or close friend would not, we believe, have added credibility to any of the individual mitigating factors which were supported by the evidence and considered by the jury. The trial judge did not err in excluding the testimony of Dr. Humphrey.

III.

Defendant next contends that he is entitled to a new sentencing hearing because of several allegedly improper statements made by the prosecutor at the completion of the sentencing phase of the trial. The defendant's exceptions pertain to remarks regarding (1) the defendant's character and credibility; (2) the credibility of defendant's witnesses; (3) the weight to be given to the mitigating factors; (4) certain biblical quotations; and (5) the reading of a portion of an opinion written by this Court. Defendant again failed to object to any of the above remarks. We find nothing in the prosecutor's argument so grossly improper as to require the trial judge to act *ex mero motu*. *See State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

[10] With respect to the remarks impugning the character of the defendant and the credibility of both the defendant and his witnesses, the record discloses that each comment was based upon the evidence or on inferences properly drawn therefrom. *See State v. Peach*, 306 N.C. 1, 292 S.E.2d 203.

[11] Concerning the weight to be given to the mitigating factors, the prosecutor told the jury that "even though you find (the mitigating factors) to exist, you may not accord them any weight in mitigation." The prosecutor then went on to discuss each of the fourteen mitigating factors which would be submitted. For example, with respect to the age of the defendant (thirty-seven) as being a factor in mitigation, the prosecutor noted that there was a coincidence between his age and the fact that defendant inflicted thirty-seven stab wounds; that obviously this factor had been proved and must be considered, but that it should be given no weight. When taken in the context of the prosecutor's careful discussion of each of the mitigating factors, together with the instructions by the trial judge, the comment was within allowable limits of argument. *See State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983).

[12] The biblical quotations which form the basis of defendant's next exception are not improper in context, when defendant's propensity to quote the Bible in his defense is considered. The prosecutor may have injected his personal opinion as to the value of the Bible as being "maybe ... the very best law book we have got," but we do not consider this statement grossly improper. *See State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304.

Defendant strenuously objects to the prosecutor's quoting a portion of *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974), a case that was overruled by *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Defendant argues that by so quoting, the prosecutor violated N.C.Gen.Stat. § 84-14 which permits counsel to include in argument quotations from opinions or statutes that are relevant and refer to authoritative rules of law. *See State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977). Counsel may not read an unconstitutional statute and therefore, argues defendant, by analogy counsel may not quote from a case which has been overruled.

We note initially that this Court on occasion cites as authority cases which have been reversed or overruled where the issue in question, particularly an evidentiary issue, is unaffected by the rationale giving rise to the ultimate disposition of the case. Defendant here argues, however, that the portion of the *Jarrette* opinion quoted by the prosecutor "was part of the rationale holding that a mandatory death sentence could constitutionally be imposed for a conviction of first degree murder and rape" which conclusion was later overruled. The prosecutor's remark, including the quoted portion of *Jarrette*, is as follows:

> And ladies and gentlemen of the jury, the Supreme Court of North Carolina and they have seen hundreds and hundreds of thousands of these cases come through their court system, and their opinion should be given weight. And what do they say? "The steady rising tide of crimes of the most serious nature throughout the nation has occurred in an era of unprecedented permissiveness in our society, in an emphasis on sympathy for the accused rather than for his victim and those endangered by him." And they said this ladies and gentlemen of the jury, in a first degree murder case. They said this, this unprecedented permissiveness in our society of sympathy for the accused. "This is ample basis for reasonable man, not just people running out here mad, under the passions of the moment, for reasonable people, to conclude that some punishment of exceptionally vicious crimes, other than imprisonment, coupled with carefully organized programs for rehabilitation, to assure that the prisoner, that he had the sympathy of society, is necessary to bring about the turning of the tide."

[13] We do not agree with defendant's characterization of the quoted portion of *Jarrette* that it formed the rationale of the decision in that case to the extent that the prosecutor was prohibited from referring to it in his argument. The issue in *Jarrette* was whether the capital sentencing scheme as it then existed was constitutional. The Supreme Court of the United States later invalidated that scheme. That Court has since clearly authorized the imposition of the death penalty under carefully limited circumstances. Much of the discussion in *Jarrette*, including the above-quoted portion of the opinion, dealt in general terms with the various arguments which this Court felt justified a death penalty. The above-quoted portion was written in the context of the deterrent effect of a sentence of death and we read the prosecutor's comments here to be likewise an argument relating to the need for the death penalty for its value as a deterrent.

In this regard, we note with interest that the defense attorney responded to the prosecutor's remarks as follows:

> I have heard the argument so many times. I have heard so many people say that the death penalty is a deterrent, it has a deterrent effect. And the District Attorney, of course, never argued that to you directly, but he asked you to send a message. He asked you to send a message to put a stop to this, put a stop to this permissive society that we live in. I believe is what he said. And what he is really talking about, of course, is the deterrent effect argument of the death penalty.

[14] Defense counsel then argued strenuously and at length that "the logic of the death penalty as a deterrent is imper-

fect. . . . We cannot, we cannot kill people who kill people to show that killing is wrong. It just doesn't work. It never has." Defense counsel stated that the death penalty was not deterrence, but prevention, and erroneously informed the jury that defendant would spend the rest of his life in prison[1] thereby providing the necessary prevention. In light of our assessment, as well as defense counsel's assessment of the prosecutor's motive for quoting from *Jarrett*, we do not agree that this portion of the argument was so grossly improper or prejudicial as to require action on the part of the trial judge or to require a new sentencing hearing.

IV

[15] Defendant next argues that the trial court erred in instructing the jury that it could but was not compelled to answer "yes" or "no" to each of the mitigating factors that were submitted but was required only to indicate, as the third issue, whether it found one or more mitigating factors to exist. Defendant objected to the instructions as given which appear in the transcript in three separate locations.

This argument has been advanced to our Court on numerous occasions and has been rejected. *See State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, — U.S. —, 103 S.Ct. 3562, 77 L.Ed.2d 1396 (1983); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1088, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *State v. Peirce*, 306 N.C. 1, 292 S.E.2d 203, *cert. denied*, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982). We do not agree with defendant's assertion that the trial judge, by these instructions, failed to inform the jury that it *must* consider each listed mitigating circumstance before answering "yes" or "no" to the third issue. While the trial judge's first instruction might be somewhat ambiguous, he later stated "In considering that issue (issue 3), *you must consider the sub-issues or subsections submitted there, 1 through 14.*" (Emphasis added.) We hold that the trial judge properly instructed the jury on its duty on how it was to consider the mitigating factors.

V.

Defendant contends that the trial judge erred in failing to correctly instruct the jury on the mitigating circumstance that the defendant was under the influence of mental or emotional disturbance. The trial judge instructed that:

> A defendant is under such influence if he is in any way affected or influenced by a

men of the jury, that needs a little clarification. You are not part of the legal machinery, you are the legal machinery that puts the man to death. You are the ones, and you alone who sign the paper that says death. That march ladies and gentlemen of the jury puts some things into action. They take him down to Raleigh, put him in Central Prison, and sit him on death row, and on a day certain and in a year certain and an hour certain, they lead him into the gas chamber, or carrying out your orders. They strap him in the g[as] chamber, ladies and gentlemen of the ju[ry] because you told them to. And then the man drops the pellet in the little pool of acid. He carries out your orders. And then they crank open the louvers and gas fills the gas chamber and he inhales gas. Poisonous gas flies his lungs, bursts, and blood oozes from his mouth.

We consider this portion of defense counsel's argument improper, and highly improper. *See State v. Ashburn*, 294 N.C. 197, 204, 240 S.E.2d 752, 757 (1978).

1. N.C.Gen.Stat. § 15A-1370.1 states that Article 81 of the North Carolina General Statutes "is applicable to all sentences prescribed, including Class A and Class B felons and Class C felons who receive a sentence of life imprisonment." N.C.Gen.Stat. § 15A-1371 states in pertinent part that:

> "(a1) A prisoner serving a term of life imprisonment with no minimum term is eligible for parole after serving 20 years. This subsection applies to offenses committed on and after July 1, 1981."

We disapprove of defense counsel's attempt to misinform the jury as to the effect of a life sentence and caution defense attorneys to avoid such remarks at any stage of the trial proceedings. We furthermore note with some concern that defense counsel provided the jury with the following assessment of its responsibility in determining a sentence:

> "The D.A. mentioned, as the owner of this thing, I believe the question he put to you was, could you toss a part of the legal machinery that put this man to death. Ladies and gentle-

mental or emotional disturbance at the time he kills. Being under the influence of mental or emotional disturbance is similar to, but not the same as being in the heat of passion upon sudden or adequate provocation. A person may be under the influence of mental or emotional disturbance even if he had no adequate provocation and even if his disturbance was not so strong as to constitute heat of passion or to preclude deliberation. For this mitigating circumstance to exist, it is enough that the defendant's mind or emotions were disturbed from any cause, and that he was under the influence of the disturbance when he killed Wanda Philips Hartman. You would find this mitigating circumstance if you find that on the 7th of August, 1982, the defendant, Arthur Martin Boyd, Jr., was suffering from the effects of excessive use of alcohol and excessive use or abuse of drugs, that he was still suffering from the loss of his father at an early age, his early age, and of his grandfather at an earlier age, that he was suffering from the loss of the woman that he testified he loved, Wanda Philips Hartman; that at this time on August 7th, 1982, then that he was so suffering from the mental or emotional disturbance that he was affected and suffered impairment *or loss of his faculties* to the extent that you *should* find or be satisfied from this evidence that he was under the influence of some mental or emotional disturbance.

The first one, as I mentioned, was that the murder was committed while Arthur Martin Boyd, Jr. was under the influence of mental or emotional disturbance. The burden is upon the defendant to satisfy you from the evidence and by its greater weight that he was so under the influence. If he has so satisfied you, you *could* answer that issue yes in his favor; if not so satisfied, you would answer the issue 'no.' (Emphasis supplied.)

The defendant argues that "[n]owhere in the entire charge on this mitigating circumstance was the jury told that if it found that the defendant was under the influence of a mental or emotional disturbance, it must, or had a duty to find this mitigating circumstance and consider it in the defendant's favor in its sentence determination." Defendant also objects to the instruction as given inasmuch as "it added to the defendant's burden an additional element to be proven" in that "[i]t required the defendant to prove not only that he was under the influence of a mental or emotional disturbance at the time, but that this disturbance was so great that it *imposed or caused a loss of his faculties.*" (emphasis in the original).

Defendant objected to this instruction during jury deliberations, but not on the grounds argued on appeal. Rather the objection was stated as follows:

> Your Honor, we would like to OBJECT to the Court instructing the jury on the mitigating factor of the defendant was laboring under a mental or emotional disturbance at the time of the crime wherein the Court stated that the defendant should be, would have to be suffering from the loss of a grandfather or father or abuse of drugs, or one of these, before this mitigating circumstance could be found.

Thus, with respect to the arguments presented on appeal, we will apply the plain error rule as enunciated in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). *See State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

[16] Defendant's first attack on this instruction is launched at the trial court's use of the word "could" ("you *could* answer that issue yes in his favor"); in its final mandate. As the trial judge, apart from this one *lapsus linguae*, instructed with the mandatory "would" or "should," we do not consider this grammatical *lapsus* so serious as to amount to plain error.

[17] Defendant's objection to the trial court's use of the word "faculties" is equally without merit. The trial judge had earlier in the instruction, clearly defined mental, or emotional, disturbance, concluding that "it is enough that defendant's mind or emotions were disturbed from any cause,

and that he was under the influence of the disturbance when he killed Wanda Phillips Hartman."

A mental or emotional disturbance must obviously affect some functioning of the afflicted mind, i.e. cause an impairment or loss of an individual's "faculties." Contrary to defendant's characterization of this word as connoting "some sort of insanity, incompetency or senility," we find the definition of "faculties" quite innocuous:

"4a. ability to act or do whether inborn or cultivated . . . b: an inherent capability, power, or function . . . c: one of the powers or agencies into which psychologist formerly divided the mind (as will, reason, instinct), and through the interaction of which they endeavored to explain all mental phenomena, d: obs: personal characteristics . . ." Webster's Third New International Dictionary of the English Language (1968).

In the context of the overall instructions, we find nothing sinister or additionally burdensome associated with the word "faculties." This assignment of error is overruled.

VI.

Defendant next contends that he was deprived of a fair sentencing determination because the trial judge allegedly expressed his opinion on the credibility of defendant's witnesses and the evidence while instructing the jury on the mitigating factors. Defendant points to the following statements:

1) In instructing on the non-statutory mitigating factor that defendant had lived with the deceased and desired a reconciliation, the trial judge, after summarizing defendant's evidence, stated:

You will recall the testimony presented by Mr and Mrs. Phillips as to the events occurring in that connection with regard to whether or not there was a genuine desire for reconciliation at that time.

[18] Defendant argues that this statement expressed the opinion that "the State had introduced evidence through Mr and Mrs. Phillips that the defendant did not have a genuine desire for reconciliation" and that the trial judge "disbelieved all of the defendant's evidence that there was a 'genuine' desire to reconcile with Wanda." Thus, argues defendant, by this one statement "all the defendant's efforts to convince the jury of his genuine feelings of love, frustration, deep sense of loss and inability to cope with the reality of losing Wanda were negated." Our reading of this statement discloses no such expression of opinion. The objection borders on the frivolous.

The second objection argued under this issue involved the trial judge's instruction on defendant's mitigating factors that he had expressed a devotion to God and had been baptized. The trial judge stated:

You will recall the testimony of the defendant and of one of the preachers that on the 15th day of January, 1968, the defendant was allowed to leave the jail in Surry County and go out to a place called Holder's Bottom, as I understand the testimony, you will recall that for yourself, where a baptism service was then held and he was baptized. The defendant saying and contending that you should be satisfied that this is a mitigating circumstance, the State saying and contending that you should be very skeptical of this and scrutinize this testimony very carefully, not that you would doubt the word of the minister but you would doubt the sincerity of the defendant because he himself testified that he made a false confession at an earlier time in an effort to get Wanda back.

[19] This appears to be an accurate statement of the evidence and the contentions of the parties. We find no basis for objection.

[20] Nor does our reading of the trial Court's instruction on the mitigating factor that defendant sought help from others disclose error favorable toward one party or the other or any form of judicial opinion.

[21] In contending that the trial judge expressed his opinion on the credibility of defendant's evidence during the instruction

on defendant's addiction to drugs and alcohol as a mitigating factor, the defendant points to the following:

You will recall the further testimony that he was taking anti-abuse for a period of two and a half years and took it according to the probation officer up until Thursday before this murder took place. Now whether he was taking anti-abuse and at the same time abusing alcohol and drugs to the extent you have heard is a matter for you to say and determine.

Once again we find nothing objectionable in this statement. Defendant's own evidence was to the effect that he was addicted to drugs and alcohol and was also involved in an anti-abuse program.

Finally defendant advances a somewhat circuitous argument that because the trial judge excluded Dr. Humphrey's testimony concerning stressful life events and criminal homicide, his instruction on the nonstatutory mitigating factors concerning defendant's loss of his father and grandfather was erroneous. The trial judge stated:

The defendant saying and contending that the loss of his grandfather when he was five years old and the loss of his father when he was either six or eight months old, or three years old creates certain conditions of stress in the mind of the defendant and that you should consider these as mitigating circumstances.

Essentially defendant contends that when Dr. Humphrey's testimony was excluded, he was forced to list these losses as separate mitigating factors, at which point it was error for the trial judge to attempt "to tie the defendant's contentions to the effect the losses had on defendant's mental state."

[22] Defendant overlooks the fact that defense counsel, during final argument, quite successfully "tied in" these stressful life events" to defendant's mental state. Counsel argued:

Ladies and gentlemen of the jury, I say and contend to you that that has some mitigating value in this case. This man desperately wanted this woman back. I say and contend to you that he truly loved her. I say and contend to you that he loved her more than anything in the world, more than anything that he had ever loved before. A man who has lost his father at an early age, lost his grandfather, lived the way he has with drugs and alcohol, and finally found something that had a little meaning in his life, and he let it get away from him. And he is desperately seeking to get it back.

Now, ladies and gentlemen of the jury, I don't know that any of you all have ever gone through that. I know I haven't. I don't know if any of you all have or not. I didn't ask you those questions when we selected this jury. But I know one thing, the more we read and the more we hear about losing people, losing mamas and losing daddies, I don't care what it is, ladies and gentlemen of the jury, whether you lose your mama or your daddy, it's going to have an effect on people. Yes, ladies and gentlemen of the jury, it will have an effect on, this little girl over here. It will. It is going to have an effect on her, ladies and gentlemen of the jury.

Why does the District Attorney argue that to you, that he won't forget about that little girl, as long as he lives? I probably won't either. But yet he wants to say, so what. He lost his daddy. So what? Are we supposed to come into court and say she will suffer but he didn't? It means something to her but it won't to him, it hasn't to him? That, ladies and gentlemen of the jury, is one of the mitigating circumstances that we are submitting to you, that he lost his father at an early age in life. You heard him testify and you heard his mama testify. His father left when he was a young child. He never had any father. Never had any father. He was reared, ladies and gentlemen of the jury, by the lady that you folks saw testify yesterday. I put her up there so you could see who she was and see the lady that reared this defendant.

The fact that he lost his grandfather at an early age in life. You heard what his mother said about that. It caused some type of problem with this young man, five years old when he lost his grandfather. Ladies and gentlemen of the jury, you will have to decide if that mitigates or not. But it's hard for me to see how one side can say it will be tough for this person but it ain't tough for him. So what? So what?"

The trial judge's instruction on these factors was proper.

Our reading of the trial transcript discloses that the trial judge's instructions to the jury in this case were thorough, amazingly accurate considering the volume of testimony, detailed, balanced, and fair. In every instance he carefully stated the contentions of both parties. This assignment of error is overruled.

VII.

[23] Defendant also argues that the trial court erred in failing to instruct the jury that the State had the burden of proving beyond a reasonable doubt that the aggravating circumstances substantially outweighed the mitigating circumstances sufficiently to call for the death penalty. Defendant further argues alternatively that the trial court erred in instructing the jury that it *must* return a verdict of death if it found that the aggravating factors outweighed the mitigating factors thereby lowering the State's burden of proof. As was the case in *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, we again find the challenged jury instructions free from constitutional and prejudicial error.

Defendant's remaining assignments of error are prefaced as follows: "The following issues are all issues this Court has previously and recently decided against the defendant. He merely raises them here to give this Court an opportunity to re-examine its previous holdings, and, if this Court declines to do so, for purposes of preserving the issues for later review by a Federal court. *See Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)." While we decline to alter our position on these issues, each will be addressed *seriatim*.

VIII.

Defendant contends that he was denied a fair trial because several jurors were improperly excluded from the jury panel due to their beliefs concerning the death penalty. Specifically, defendant claims: (a) that death qualifying a jury prior to the guilt phase results in its being guilt and death prone; and (b) that two jurors were excused in violation of the standard set out in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[24] With respect to defendant's contention that a guilt and death prone jury results from death qualification, this Court has consistently held the current jury selection process in this State in first-degree murder cases constitutional. *See State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197 and *cases cited therein*. We again decline to reconsider this issue.

[25] Defendant further contends that two jurors, Arrington and Garland Smith, were excluded from the jury panel in violation of the rule in *Witherspoon*. Upon examination of the jury proceedings it appears that juror Arrington did indeed state unequivocally that he could not impose a sentence of death.

COURT: And regardless of the evidence, however strong it might be, you say you could not and would not vote for the death penalty?

MR. ARRINGTON: No sir.

Juror Smith, while initially appearing indecisive, did finally state his opposing opinion.

COURT: At this time can you say that your mind is closed to the question of the death penalty?

MR. SMITH: Yes sir.

This Court finds no error in the exclusion of jurors based on their express opposition to and refusal to apply the death penalty.

Defendant's assignment of error is therefore overruled.

IX.

[26] Defendant's next contention is that the trial court erred by not informing the jury during the penalty phase that if it was deadlocked a life sentence would be imposed. The jury here deliberated for only one hour and forty-seven minutes. This Court stated in *State v. Williams*, 308 N.C. 47, 73, 301 S.E.2d 335, 351–52, *cert. denied*, — U.S. —, 104 S.Ct. 202, 78 L.Ed.2d 177, *reh. denied*, — U.S. —, 104 S.Ct. 518, 78 L.Ed.2d 704 (1983), that "such an instruction is improper because it would be of no assistance to the jury and would invite the jury to escape its responsibility to recommend the sentence to be imposed by the expedient of failing to reach a unanimous verdict." We therefore hold that the trial court did not err in failing to give this instruction and, thus, overrule defendant's assignment of error.

X.

[27] Defendant argues that the aggravating factor of "especially heinous atrocious or cruel", N.C.Gen.Stat. § 15A-2000(e)(9), is unconstitutionally vague on its face as construed and applied in North Carolina and under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Defendant recognizes that this aggravating circumstance has been consistently upheld when attacked on constitutional grounds of vagueness, yet he urges us to reconsider our position on this issue. We recently did so in *Maynard*, 311 N.C. 1, 316 S.E.2d 197, and found our interpretation to be entirely consistent with the mandate of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 and *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). *See State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304. We decline to alter our position on this issue and overrule the assignment of error.

XI.

[28] Defendant asserts that he was denied due process by the trial court's failure to instruct the jury that the State had the burden of proving the non-existence of each mitigating circumstance beyond a reasonable doubt. Defendant further asserts that the trial court erred in placing the burden on him to prove each mitigating circumstance by a preponderance of the evidence. We have consistently rejected this argument and do so again here. *See State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197 (1984); *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144. This assignment of error is overruled.

XII.

[29] Defendant argues that the North Carolina capital murder scheme permits subjective discretion and discrimination in imposing the death penalty and is, therefore, unconstitutional under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. This Court has repeatedly ruled that N.C.Gen.Stat. § 15A-2000 is constitutional and here do so again. *See State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197. We overrule this assignment of error.

XIII.

Defendant contends that the North Carolina death penalty statute, N.C.Gen.Stat. § 15A-2000, and consequently the verdict of death in this case, is unconstitutional. The constitutionality of N.C.Gen.Stat. § 15A-2000 has been upheld repeatedly. *See State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197. Defendant's assignment of error is therefore overruled.

PROPORTIONALITY

After a thorough review of the transcript, record on appeal, and the briefs of the parties we find that the record fully supports the jury's written findings in aggravation. We further find that defendant's death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor and that the

transcript and record are devoid of any indication that such impermissible influences were a factor in sentencing.

[30] Finally we have determined that the death sentence imposed is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. *See State v. Williams*, 308 N.C. 47, 301 S.E.2d 335. We find this case comparable to *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933, 102 S.Ct. 431, 70 L.Ed.2d 240, *reh. denied*, 454 U.S. 1117, 102 S.Ct. 693, 70 L.Ed.2d 655 (1981).

We upheld defendant's sentence of death in *Martin* for the shooting death of his wife. As in the present case, the murder was preceded by threats against the victim; the defendant did not murder the victim "in a quick and efficient manner." *Id.* 303 N.C. at 253, 278 S.E.2d at 219; the victim was murdered in the presence of the victim's child; and defendant presented evidence of social and emotional problems.

The cases cited by defendant involving killings of lovers or spouses in which defendants received life sentences are not comparable. In two cases it was not clear that the defendant personally killed the victim. *See State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983); *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982). *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981). In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), and *State v. Colvin*, 297 N.C. 691, 256 S.E.2d 689 (1979), there was some evidence to suggest that the killing was not deliberate, and in *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980), defendant, who had no significant history of criminal convictions, testified that the killing was accidental. In two cases no aggravating factors were submitted. *see State v. Calloway*, 305 N.C. 747, 291 S.E.2d 622 (1982); *State v. Muenhemer*, 304 N.C. 109, 282 S.E.2d 791 (1981), and therefore they are not included in the pool used for proportionality review. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (1983). In *State v. Anderson*, 308 N.C. 148, 276 S.E.2d 288 (1981), *State v. Clark*, 300 N.C. 116, 265 S.E.2d 204 (1980) and *State v. Franks*, 300 N.C. 1, 265 S.E.2d 177 (1980), there was evidence that the defendants were suffering from legitimate mental or emotional disorder. In the present case, by contrast, there was overwhelming evidence of defendant's guilt, scanty evidence of emotional or mental disorder, which, together with defendant's significant history of criminal convictions and the heinous nature of the crime, including suffering of the victim, provide the basis for a penalty of death.

NO ERROR.

EXUM, Justice, dissenting as to sentence.

The evidence shows defendant, in a public place and in full view of several witnesses, including the victim's mother, stabbed to death the person whom he professed to love the most. The central question at the sentencing hearing was: "Why?" The state argued the crime was motivated by defendant's mean selfishness. Defendant, argued the state, killed the victim because he did not want anyone else to have her if he could not. This is a motive theory that is easy to sell in this kind of case. It may be the truth. Defendant's motive theory was different, less apparent to the average observer, and probably more difficult to sell. It was a theory which does not excuse the crime but which might have mitigated it in the eyes of the jury. Defendant's motive theory was, in a nutshell, this: Defendant has suffered a number of severe personal losses during his life. He lost his father, his grandfather, his friends, and his liberty. The thought of losing Wanda was so unbearable that defendant considered killing himself. The act of killing Wanda, the one closest to him, was, in effect, an act of self-destruction. Perhaps this is not the truth.

The question before us is not which motive theory, the state's or the defendant's, is more worthy of belief. That question is for the jury. The question is whether defendant should be permitted to offer evidence in support of his theory. The majority says not and affirms a death sentence imposed after a hearing at which defendant was precluded from proffering his theory in mitigation because Professor Jack Humphrey's testimony upon which the theory wholly rested was excluded from the jury's consideration. I cannot join in this decision. Neither reason nor precedent provide any support for it.

The majority concludes Professor Humphrey's testimony is inadmissible because it finds his opinions to be "of questionable scientific import or value in mitigation" and to suggest merely "that defendant's act in murdering Wanda Hartman was predictable."

Many expert opinions in controversial areas are not only "questionable", they are often vigorously questioned by opposing experts in courts of law. That an expert's opinions may be "questionable" has never been a ground for excluding them from evidence. It goes to the weight not the admissibility of expert testimony.

Generally experts are permitted to give their opinions if through study or experience they are better qualified than the jury to have an opinion on the particular subject under inquiry. N.C.Gen.Stat. § 8-58.13 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

An expert's opinion is admissible if it is "based on the special expertise of the expert, that is, . . . the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Spencer*, 295 N.C. 314, 323, 235 S.E.2d 828, 834-35 (1979); accord, *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978).

The record demonstrates that Professor Humphrey was a duly qualified expert criminologist. He received his doctorate in sociology "with a concentration in criminology" in 1970 from the University of New Hampshire. He is a full professor at the University of North Carolina at Greensboro where he teaches courses in criminology, criminal justice, juvenile delinquency, and deviant behavior. He has published books entitled: *Panorama of Suicide*, based on a federally funded project on suicide in New Hampshire; *Administration of Justice*; and is presently working on a book, *Deviant Behavior*, which is due to be published "in the next year or so." He has worked with Dr. Page Hudson, North Carolina's Chief Medical Examiner, "on various projects . . . having to do with violent and unexplained death. Many of those papers . . . are co-authored with Dr. Hudson." Professor Humphrey has participated in various professional meetings "delivering papers on matters of suicide and homicide and other forms of violence." Since 1968 his professional studies "have concentrated almost solely on violent death."

Clearly criminology is an area of "scientific, technical, [and] specialized knowledge." It is defined by *Webster's Third New International Dictionary* as "the scientific study of crime as a social phenomenon of criminal investigation of criminals and of penal treatment." According to *The Columbia Encyclopedia* (3d ed. 1963), criminology has "[s]ince 1910 . . . become a science with the introduction of intensive research and statistical analysis. . . . Criminology as a study also embraces environmental, hereditary, or psychological causes [of crime] . . . ."

Most recently Professor Humphrey conducted a study and co-authored a report based thereon with professor Stewart Palmer, "one of the leading figures in homicide research in the United States and author of *Psychology of Murder: the Violent Society*." This study, done in cooperation with the North Carolina Department of Corrections, was directed essentially to two questions. One was "Is homicide offenders over the course of their lifetime suffer more [stressful life events] than do nonviolent felons." The second was "Is there a difference between offenders who kill family members or someone close to them

as opposed to people who kill strangers or mere acquaintances." After conducting studies of some 272 homicide offenders and 192 non-violent offenders incarcerated in the North Carolina Department of Corrections, Professors Humphrey and Palmer concluded that "homicide offenders tend to experience more stressful events than do non-homicide offenders over the course of their lifetime prior to the commission of the crime." More importantly, for purposes of this case, the professors also considered a "major finding" to be that "people who tend to kill those close to them tend to experience more loss in their lives than those who kill strangers." (Emphasis supplied.)

The import of Professor Humphrey's testimony was not that defendant's act was predictable. Indeed he never so testified. His testimony was directed toward explaining defendant's conduct and establishing defendant's motive for the murder. Professor Humphrey was prepared to testify:

> The more loss in someone's life, the more likely they are to become self-destructive. And it seems that killing a family member or killing a close friend is an act of self-destruction. They are, after all, killing something that is part of them, very close to them, very important to their self. They are destroying them. So is the act of killing another person. They are in fact destroying part of their self, a self-destructive act.

Professor Humphrey interviewed defendant. He was prepared to testify that during this interview defendant related a life "which seemed to involve an inordinate amount of losing things: losing his father, losing his grandfather. He didn't have very many friends, and those he had he kept losing them. As his life progressed he lost his liberty. He was incarcerated repeatedly. [T]he one predominate factor he seemed to be relevant about . . . When asked about the offense in question, defendant said, 'The most important thing to me at the moment was this relationship with my girlfriend, and . . . he was on the verge of losing that, at the time the crime was committed.' Defendant further volunteered information that before the homicide 'he would wake up in the middle of the night with thoughts of killing himself.'"

Professor Humphrey was prepared to testify that "what struck me is the consistency of Mr. Boyd's life with what we found to be true of homicide offenders in general. It seemed pretty obvious that what was true of the group of people who had killed someone close to them was especially true of Mr. Boyd." This was "[m]ainly . . . the accumulation of loss throughout their lives, and this tendency to be self-destructive."

Professor Humphrey was prepared to testify that people like defendant "who are threatened with loss . . . of someone very close to them, wife, girlfriend . . . become depressed . . . and depression is in a sense anger turned toward yourself . . . Those people who destroy someone or something at that point will not destroy a stranger, will not indiscriminately kill. They don't constitute a threat to the public. They constitute a threat to that which they fear losing the most, the person closest to them. And it is that person that is unfortunately in harm's way. And having extended that aggression toward other people they are in fact aggressing toward themselves. They are destroying that which they fear losing the most. . . . A desperately needed part of their life."

Under our rules governing the admissibility of expert testimony, Professor Humphrey's testimony was competent on the question of defendant's motive. He was a duly qualified expert criminologist by training, study and experience and he was in a better position to have opinions on this question than the jury. The jury, of course, would have been free to reject his opinions. There is, however, no legal reason for excluding them from the jury's consideration.

Decisions of the United States Supreme Court have been replete with references which point consistently to the proposition that a death sentence may not be constitutionally carried out if the sentencing authority is not permitted to consider all aspects of a defendant's character, mentality, emotional makeup, record, and circumstances of the crime which might tend to mitigate the offense in the eyes of the jury. *Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982) ("background and mental and emotional development of a youthful defendant [must] be duly considered in [a capital sentencing proceeding]"); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer [in a capital sentencing proceeding] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (a process for imposing a death penalty is unconstitutional if it "excludes from consideration in fixing the ultimate penalty of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of human kind").

This Court in interpreting our statute has said: "The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation," recognizing, of course, that evidence which is "repetitive or unreliable . . . or lacking in an adequate foundation" may be excluded. *State v. Finch*, 307 N.C. 1, 19, 292 S.E.2d 203, 219 (1982). The Court has further said, "Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. *See Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). However, as in any proceeding, evidence offered at sentencing must be pertinent and admissible, and if it passes this test in the first instance, it should not ordinarily be excluded." *Id.* at 306 N.C. at 19, n. 9, 292 S.E.2d at 219.

Professor Humphrey's testimony meets all these requirements for admissibility. It was not repetitive. It was based on scientifically conducted criminological studies including an interview with defendant, done in accordance with the dictates and discipline of this science. It was pertinent and no less reliable or dependable than similar expert testimony ordinarily admitted every day in courts of law. The testimony was proffered to mitigate the crime. The testimony was sufficient to permit, but not require, the sentencing jury reasonably to infer that defendant did not murder the victim out of meanness or selfishness but rather out of a sense of unbearable personal loss in which the killing was in defendant's mind an act of self-destruction. It was only in the light of Professor Humphrey's testimony that evidence which the jury heard regarding the defendant's other losses made sense. As defendant aptly puts it in his brief, without Professor Humphrey's testimony, "the entire structure of the defendant's theory of mitigation was shattered into little pieces. Presented only as broken bits, there was virtually no hope that the defendant could convince the sentencing jury that his was a case arising out of the 'frailties of human kind' which called for compassion and mitigation of the ultimate penalty of death."

Although it is not entirely clear from its opinion, the majority apparently also holds that even if it was error not to admit Professor Humphrey's testimony, the error did not prejudice defendant. An error of constitutional dimension, as I think this was, is prejudicial, i.e. reversible, unless an "appellate court finds that it was harmless beyond a reasonable doubt." N.C.Gen.Stat. § 15A-1443(b). Other errors are reversible if "there is a reasonable possibility that, had the error . . . not been committed, a different result would have been reached at the trial." N.C.Gen.Stat. § 15A-1443(a). In Professor Humphrey's testimony, the jury heard evidence which, if believed, would explain defendant's motive, its strength, its origin, defendant's state of mind, and defendant's capacity to premeditate and deliberate. Given his impressive academic credentials, there is a reasonable possibility that admission of his testimony would have produced a different result at trial. Clearly, I cannot conclude beyond a

reasonable doubt that its exclusion was harmless.

Because of the exclusion of Professor Humphrey's testimony, defendant is entitled to a new sentencing hearing.

MARTIN, J., joins in this dissenting opinion.

STATE of North Carolina

v.

Otto WITHERS, Jr.

No. 287A83.

Supreme Court of North Carolina.

Aug. 28, 1984.

Defendant was convicted in the Superior Court, Mecklenburg County, Robert E. Gaines, J., of first-degree murder and assault with a deadly weapon with intent to kill, and he appealed. The Supreme Court, Branch, C.J., held that: (1) error, if any, in trial judge's sustaining of State's objection to testimony regarding surviving victim's alleged out-of-court statement that shooting was an accident did not prejudice defendant; (2) following full sentencing hearing pertaining to defendant's first-degree murder conviction, defendant was not entitled to a second hearing prior to sentencing on assault charge; and (3) statute providing that evidence necessary to prove element of offense may not be used to prove any factor in aggravation did not preclude use of defendant's prior convictions to aggravate assault charge.

No error.

1. Criminal Law ⇐1170½

In prosecution for first-degree murder and assault with deadly weapon with intent to kill, any error by trial judge in sustaining State's objection to testimony regarding surviving victim's alleged out-of-court statement that shooting was an accident did not prejudice defendant, in light of equivocal nature of ruling, absence of instruction to disregard such evidence and trial judge's later instruction in his recapitulation of evidence that jury could consider such statements in their deliberations.

2. Criminal Law ⇐966.1

Sentencing hearing before judge and jury on first-degree murder charge was sufficient to afford defendant all rights he was entitled to under statute requiring sentencing hearing on all felonies other than capital felonies and thus, trial court did not err in failing to conduct second sentencing hearing limited only to defendant's conviction for assault with deadly weapon with intent to kill prior to sentencing on such charge, since two crimes with which defendant was charged were committed contemporaneously and evidence adduced at hearing was equally applicable to assault conviction. G.S. §§ 15A-2000 et seq., 15A-1334.

3. Homicide ⇐354

Trial judge acted within his discretion in imposing maximum, ten-year sentence upon defendant convicted of assault with a deadly weapon with intent to kill, since record plainly supported trial judge's finding in aggravation that defendant had previously been convicted of two offenses punishable by more than 60 days confinement.

4. Criminal Law ⇐966.2(1)

Statute providing that evidence necessary to prove element of offense may not be used to prove any factor in aggravation did not preclude use of defendant's prior first-degree murder and assault with intent to commit rape convictions to aggravate sentence for assault with a deadly weapon with intent to kill charge, even though such charges and fact that defendant was on parole were admitted at trial in attempt to show that defendant killed victim and attempted to murder her mother because he

APPENDIX B

Supreme Court of the United States

No. A-289

ARTHUR MARTIN BOYD,

Petitioner,

v.

NORTH CAROLINA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 26, 19 84

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 19th
day of October, 19 84

§ 14-17. Murder in the first and second degree defined; punishment.

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class C felon. (1893, cc. 85, 281; Rev., s. 3631; C.S., s. 4200; 1949, c. 299, s. 1; 1973, c. 1201, s. 1; 1977, c. 406, s. 1; 1979, c. 682, s. 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 1, 2; 1981, c. 662, s. 1.)

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

1. Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
2. Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f) which outweigh the aggravating circumstance or circumstances found, exist; and
3. Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment, provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

1. The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
2. That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and
3. That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.
(2) The defendant had been previously convicted of another capital felony.
(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.
(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(6) The capital felony was committed for pecuniary gain.
(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.
(9) The capital felony was especially heinous, atrocious, or cruel.
(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.
(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.
(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
(7) The age of the defendant at the time of the crime.
(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

APPENDIX E

MR. ROYSTER: Your Honor, we would call Professor Jack Humphrey to the stand at this time.

JACK HUMPHREY: Being first duly sworn, testified in this matter as follows, during DIRECT EXAMINATION BY MR. ROYSTER:

Q State your name, sir.

MR. YEATTS: If Your Honor please, we would like to OBJECT at this time and ask to be heard in regard to this witness.

COURT: Members of the jury, please go to your jury room.

(The jury leaves the courtroom.)

COURT: Well, first for the record the witness may state his name.

A Jack Humphrey.

COURT: And insofar as this witness is concerned, may I assume you have some knowledge that I do not have as to what the witness may testify about?

MR. YEATTS: Your Honor, we have a report here that the defense counsel was very kind enough to give us, entitled "Stressful Life Events of Criminal Homicide," and one of the authors of this report is a John A Humphrey. The other one is a Stewart Palmer. And we believe that this witness is called to testify about those matters, and we would object to that testimony as to his general knowledge of stressful life events of criminal homicide. Perhaps it might be enlightning, Your Honor, if we had a voir dire to see what the witness would testify to in this matter.

COURT: All right. For that purpose, Mr. Royster, do you wish to go ahead?

MR. ROYSTER: I do, Your Honor.

VOIR DIRE: By Mr. Royster:

Q What is your occupation, Professor?

A I teach criminology at the University of North Carolina

at Greensboro.

Q Are you an Associate Professor there at the University of North Carolina at Greensboro?

A Yes, sir.

Q Where did you receive your B.A. degree?

A I'm sorry?

Q Where--excuse me--did you go to school to receive your B.A. degree?

A I received a B.A. degree from Saint Anselm's College in Manchester, New Hampshire.

Q All right, sir. What was your B.A., Bachelor of Arts that you obtained there?

A It was in the Department of Sociology.

Q All right, sir. After you completed your college there at Saint Anselm's, did you obtain any further education at that point, Professor?

A Yes. I attended the University of New Hampshire and received a Masters of Arts in Sociology in 1966, or 1969, and a Ph.D. in 1973 from the University of New Hampshire.

Q What is your Ph.D. in?

A Sociology with a concentration in criminology.

Q And where did you obtain your Ph.D.?

A University of New Hampshire.

Q Since that time have you held any academic positions?

A Yes. In 1972 I was hired by the University of North

Carolina, Greensboro, and have been there since. I was hired as an Assistant Professor in '72, was promoted to an Associate in 1976, and this past year I have been promoted to full Professor effective July, 1983.

Q All right, sir. What have you taught there at the University of North Carolina at Greensboro?

A I'm in the Department of Sociology and I teach criminology, criminal justice, course in juvenile delinquency, and a course in deviant behavior.

Q And how long have you taught those courses there, ever since you have been there at the University of North Carolina?

A Yes, sir. Since 1972.

Q Professor, have you published any books relating to sociology and criminology?

A Yes. I worked on a book called "Panorama of Suicide," which has been published by Charles C. Thomas Publishing Company.

Q When did you publish that book?

A That was in 1973.

Q All right, sir. Is that related to suicide?

A Yes, that was a study done in New Hampshire, a federally funded project on suicide in that State. In 1981 I published the "Administration of Justice," published by Human Sciences Press, and am co-authoring a book called "Deviant Behavior" which will be published in the next year or so.

Q All right, sir. Have you published any articles relating to sociology and criminology? I note here there is a number here, but if you could just tell us how many you have published.

A Yeah. I might say that as a graduate student I worked on this federally funded project on suicide, and most of the work that I have done has been in the area of suicide and homicide. My dissertation was on that issue, the relationship between suicide and homicide. Since coming to North Carolina I have worked with the officer, the Chief Medical Examiner, on various projects having to do with violent death. Most of the two dozen or so publications have been in the area of violence.

Q All right, sir. I note here that there are some twenty-one articles that you have published, together with some other folks, in regards to that type of criminology and sociology, would that be correct, sir?

A Yes.

Q And where was it you said you worked since coming to the University of North Carolina at Greensboro?

A I have--the Office of the Chief Medical Examiner in North Carolina was started in 1972, the first year I came to North Carolina. Since that time I have worked, been fortunate to work with Dr. Page Hudson, the Chief Medical Examiner in this State, on various projects, research projects, having to

do with violent and unexplained death. Many of those papers in the vita are co-authored with Dr. Hudson.

Q All right, sir. Have you presented at any professional meetings any papers in regards to the field of sociology and criminology?

A Yes, sir. I have participated in about thirty professional meetings, delivering papers on matters of suicide and homicide and other forms of violence.

Q How long would you say that you have studied criminology and sociology for violent behavior, so to speak?

A I started graduate school in 1966 and since about 1968 have concentrated almost solely on violent death.

Q And you have, I know, published a number of articles in relation to that, have you not?

A Yes, sir.

Q Now, Professor, recently, the D. A. has asked or indicated to the Court, recently you conducted a study in regards to stressful life events in criminal homicide, did you not?

A Yes.

Q What was that--who was that study done with, if anyone else?

A The study was co-authorized with Professor Stewart Palmer from the University of New Hampshire. Professor Palmer is one of the leading figures in homicide research in the United States, the author of the "Psychology of Murder, the

Violent Society." He is Professor of Sociology at the University of New Hampshire and has been for the past twenty-five years. He was my dissertation advisor and that's how I came to work with he on this project. The matter had to do with why people, why people do in fact carry out violent acts. We wanted to understand if there were differences between homicide offenders and other felons, non-violent felons. The book I referred to that Palmer authored,"The Psychology of Murder," the theses there was that frustration leads to aggression, and he compared murderers and their next oldest brothers and found that in fact the murderer in his lifetime had suffered significantly more frustrating kinds of events than had his next oldest brother. The study done in North Carolina is an extension of that kind of research and what we were looking at is stressful life events as participants of criminal homicide.

Q All right, sir. Let me stop you right there and ask you this. Over what period of time did you conduct this test, Professor?

A The study was started in 1979 and we worked on it for approximately two years. It was in conjunction with a larger study of homicide in North Carolina.

Q All right, sir. And who did you obtain your information from in regards to this test?

A This study was done with the cooperation of the North

Carolina Department of Corrections. It was authorized and consented to by the Department of Corrections. And we reviewed the prison records, social histories, psychiatric histories and so on, collected by the Department of Corrections for inmates over a two-year period.

Q All right. You went, I take it, into the files of each inmate and got a history of their background, I take it?

A Yes. Yes, sir.

Q And how many people did you actually do this with, Professor? That is, how many files, how many people in the North Carolina Department of Corrections did you actually look into their files?

A The overall study involved over a thousand inmates that we look at homicide victim offender relations and matters related to that. The study having to do with stressful life events included 272 violent offenders and 193 felonious property offenders.

Q All right, sir. Now, let me make certain I understand this. You looked at the files of 272 people who have been convicted of homicide offenses, I take it?

A Yes.

Q All right, sir. And then the other 192 were people who were convicted of property offenses, I take it, breaking and entering and things of that nature, burglary, non-violent?

A Non-violent felonies.

Q Were all of the 272 people that looked into their files, were they convicted of some type of homicide, that is killing another human being?

A Yes. They were all convicted of murder in the first or second degree or first degree manslaughter.

Q All right, sir. And did you, or through your supervision, did people go in and look at the files? How was that information obtained?

A That was obtained by me and two other graduate students going through the files.

Q All right, sir. And I believe you indicated that what you were looking for were stressful life events, you referred to?

A Yes.

Q All right, sir. Now, let me ask you this, Professor, did you divide the homicide offenders, that is the 272 homicide offenders, did you divide them into any categories?

A Yes.

Q What categories did you divide them into?

A First, let me explain that there were two issues in the research. One was are stressful life events related to homicide, that is do homicide offenders over the course of their lifetime suffer more of these events than do non-violent felons. The second issue was is there a difference between offenders who kill family members or someone close to

them as opposed to people who kill strangers or mere acquaintances? So we divided the homicides into primary homicides, those who killed family members, close friends, and the second category, non-primary, those who killed total strangers or people they merely have been acquainted with.

Q Okay. So let me see if I understand you correctly, now. You divided it basically into two categories, then. You were looking to see if these stressful life events appeared in homicide offenders as opposed to non-violent offenders. And then secondly, in more detail, you were looking for, to see if these stressful life events appeared in homicide offenders who had killed someone close to them, a family member or friend or a spouse, as opposed to someone who had killed someone they did not know. Would that be a fair statement, Professor?

A Yes.

Q All right, sir. Now, in determining what were stressful life events, what authority or what information would you use to rely on there?

A The inventory of stressful events which is called the Psychiatric Epidemiological Inventory, devised by Dolran and Dolran. They are two doctors at the College of Physicians and Surgeons at Columbia who devised a checklist of stressful events, some 120 items. We used their checklist or their series of events and included events in childhood as well.

Those events that were not included in the original scale.

Q Now, Professor, after you conducted your interview of these 272 criminals, homicide offenders, and the 192 non-violent offenders, what were the results of your test at that time?

A The major findings there are these: The first is that homicide offenders tend to experience more stressful events than do non-homicide offenders over the course of their lifetime prior to the commission of the crime. It doesn't mean that people who commit burglary and other property offenses are not stressed. It just means that the violent offenders are subject to more accumulation of more of these events. Secondly, we find a difference in the type of events that occurred to people who killed family members and close friends as opposed to those who killed strangers. Now, the major finding there is this, the people who tend to kill those close to them tend to experience more loss in their lives than those who kill strangers. Now, one thing here is a loss has been found to be associated with or precipitate or lead to suicide over and over and over. The more loss in someone's life, the more likely they are to become self-destructive. And it seems that killing a family member or killing a close friend is an act of self-destruction. They are, after all, killing something that is part of them, very close to them, very important to their self. They are

destroying them. So in the act of killing another person they are in fact destroying part of their self, a self-destructive act.

Q All right, sir. Now, what type--when you refer to the word "loss," they suffered loss--what type of things are you referring to that would constitute loss?

A We looked at loss starting with childhood and on through life, and the first thing that can be lost, major thing that can be lost by a child is obviously a parent, or a sibling. Secondly, we looked at losses in childhood, such as the loss of a student role, that is being throw out of school, loss of things close to them, friends, things of this order. Later on in life what can be lost are things like jobs, your liberty by being incarcerated, for example, loss of health, loss of money, all manner of things. We looked at loss of people and loss of things that are very important to people's lives. And this included marital losses, economic losses, and the like.

Q All right, sir. Now, Professor, some time ago did you go down to the Surry County Jail with me and talk to the defendant in this case, Arthur Martin Boyd, Jr.?

A Yes, I did.

Q How long would you say you spent talking with him?

A Approximately an hour and a half.

Q An hour and a half? Now, how did you go about conducting

your interview with Mr. Boyd?

A Since I had never met Mr. Boyd, when introduced to him, I just asked him to tell me something about himself, and I asked him to tell me the first thing he could remember. The first thing that had occurred to him that was memorable, the earliest possible age he could think of. And that thing that he remembered was the death of his grandfather at the age of five.

Q All right, sir. Go ahead.

A Then I asked him to relate more of his early life, starting with the first thing you can remember is the death of your grandfather. What after that do you remember? And as we talked he related his life which seemed to involve an inordinate amount of losing things, losing his father, losing his grandfather. He didn't have very many friends, and those he had he kept losing them. As his life progressed he lost his liberty. He was incarcerated, repeatedly. His life seemed to be chaotic. At the very least chaotic. And seemed, the one predominant factor seemed to be repeated losses, an accumulation of these things. I asked him to tell me a little bit about the offense and what led up to it. He said well, that he had at the moment, the most important thing he had at the moment was this relationship with his girlfriend or paramour, and I said, "Well, what kind of thing was that?" He said well, he was on the verge of losing that, at the time

the crime was committed. During the course of the conversation there were a few things that came up, the repeated losses, and the second thing that struck me as I was talking with Mr. Boyd is his volunteering this information that prior to the homicide he would wake up in the middle of the night with thoughts of killing himself.

Q He told you that, that he had thoughts about killing himself?

A Yeah. All of this is volunteered information. I never asked him a direct question.

Q Did you want to ask him--

A And what struck me is the consistency of Mr. Boyd's life with what we found to be true of homicide offenders in general.

Q How would you say you could relate what you found out about Mr. Boyd through your interview with him down there to the results of the test that you conducted, Professor?

A It seemed pretty obvious that what was true of the group of people who had killed someone close to them was especially true of Mr. Boyd.

Q And what would those factors be?

A Mainly being the accumulation of loss throughout their lives, and this tendency to be self-destructive.

Q When you say that it was commonplace for those people to kill someone close to them and that was a self-destructive

act, could you elaborate on that a little bit and tell us how that comes about?

A Yes. It seems that people who are threatened with loss, and mainly these are losses of someone very close to them, wife, girlfriend, some close relationship, at that point that they are threatened with this loss they become depressed, very commonly depressed, and depression is in a sense anger turned toward yourself. Now, at that point people react either toward themselves totally or they will react outwardly and inwardly at the same time. Those people who destroy someone or something at that point will not destroy a stranger, will not indiscriminately kill. They don't constitute a threat to the public. They constitute a threat to that which they fear losing the most, the person closest to them. And it is that person that is unfortunately in harm's way. And having extended that aggression toward other people they are in fact aggressing toward themselves. They are destroying that which they fear losing the most.

Q That thing which they feel is a part of their life or should be a part of their life?

A A desperately needed part of their life.

MR. ROYSTER: I believe that's all of the questions I have, Professor. Thank you, sir.

MR. BOWMAN: May I proceed, Your Honor?

COURT: You may.

VOIR DIRE: By Mr. Bowman:

Q. Mr. Humphrey, I understood you to say that you were a sociologist, is that correct?

A. Yes, sir.

Q. Do you now have a Ph.D. in Sociology?

A. Yes, I do.

Q. How long have you had that degree?

A. Ten years.

Q. Would you agree with my assessment that sociology is certainly not an exact science by any measure, is it?

A. By exact, you mean?

A. I mean it is not exact to the extent that other areas of science are exact and can be checked and tested.

A. Sociology relies on statistical methods that are capable of being checked and verified.

Q. Statistical methods, however, are based upon information gathered from different individuals, is that correct?

A. Well, yes, it's an application of statistics to social data.

Q. And those statistics are taken from individuals who may be subjected to whatever it is they relate about that data, isn't that correct?

A. The information we used in this were objective kinds of information. For example, either you did lose a parent through divorce or you didn't. Someone died or they didn't.

And those kinds of data are less subject to individual interpretation.

Q. My question now, however, goes to the general field of sociology. It is not an exact or a science that can be checked with any degree of certainty, is it?

A. I don't think you would get sociologists to agree with that.

Q. My question is, is it an exact science in the way other sciences are exact science, such as people who deal in fingerprints, pathology, ballistics. It is not in any way exact to that extent, is it, Mr. Humphrey?

A. I think that would be misleading if I agree to that.

Q. At any rate, let me rephrase the question. What you know as a sociologist simply and basically is what others have told you insofar as what their feelings are and what has happened to them in their life, isn't that correct?

A. I don't know whether you want me to answer for sociology in general or answer with regard to--

Q. In general.

A. --this matter. Well, in general sociology includes demography, includes all manner of population studies, includes formal organization; these kinds of data they use are reasonably hard data. So I couldn't answer for sociology in general.

Q. Yes, sir. My question is, I'm not taking issue with the

data that you collected or the fact that you may have X number of people who said this and X number of people who said that. My question goes beyond that. There is no objective way you can check what it is they are telling you insofar as they are giving you their own subjective opinion about what they are telling you. Isn't that correct?

A No, that's not correct. That would be misleading to assume that that's correct. There are all manner of ways of verifying what people tell you.

Q All right, let me ask you about this particular study you did. Did I understand you did this in conjunction with your professor at New Hampshire?

A Yes, it was a corroborative effort.

Q And as I understand it of the--this was based primarily upon 270 people, is that correct?

A The homicide offenders were approximately 270, yes.

Q Is that right?

A Yes.

Q How many of those 270 people did you talk with personally?

A We used the records of the North Carolina Department of Corrections.

Q My question is, how many of those 270 people did you talk with personally?

A We didn't talk to anyone.

Q How many of those 270 records did someone other than

yourself look at?

A Approximately sixty percent.

Q You did not see up to sixty percent of those records, is that correct?

A That's correct.

Q How many of those records other than looking at the record, how many of those people were interviewed by you or members of your staff to see whether or not they had given correct information on the records?

A We didn't interview anyone.

Q How is it you know what they put on their records is exactly what their situation was?

A The records were, the information was gathered by the North Carolina Department of Corrections. To the extent that they verified what people told them, we are reasonably assured that it's correct.

Q You are reasonably assured?

A Secondly, when there were inconsistencies in the records, that information was not included in our study.

Q So you are telling me that you are assuming that the people in the Department of Corrections went out there and investigated every answer that went in their records and they found them to be correct. Are you telling me you are assuming that?

A We--the records include the pre-sentence report, includes

the court report itself, and includes the diagnostic information by the Department of Corrections psychologist, includes probation, parole reports, includes all manner of information on the individual. There is no way we could personally check the validity or accuracy of every one of those. But that would be true of every inmate in the prison system.

Q But you only did 270 of these, didn't you?

A Well, 270 homicides.

Q Yes, sir. You only did 270, isn't that right, over a period of several years?

A No, we did 270 homicides and 193 felonious property offenders, and we actually looked at over a thousand records.

Q How was it that you wed out the thousand that you looked through and kept these particular two or three hundred?

A The thousand records were the total group and the homicides were a fifty percent random sample of homicides over two years that were incarcerated, and the property offenders were a thirty percent random sample. It was impossible to do extensive analysis of a thousand cases.

Q How many people participated in weeding out some of the cases, if you please?

A Well, they were randomly selected, meaning that every other case was selected.

Q How many people participated in that?

A I did that.

Q You did that yourself?

A Yeah.

Q Was there any possible piece of information about any of these 270 homicide cases that you, yourself, went to an individual and said, "Hey, I'm doing a random check on this, is this in fact correct, this information you have given?" Was there any person you did that to?

A No.

Q So you are relying upon what you see on somebody's record that took some information from somebody somewhere along the line, aren't you?

A Relying on the North Carolina Department of Corrections data made available to us.

Q Another thing I think you testified to, you said they were divided up into what would be considered violent crimes and non-violent crimes, is that correct?

A Yeah, criminal homicide and property, felonious property offenses.

Q How many people participated in deciding what would be a felonious property offense and what would be a homicide? How many people--

A I selected the felonious property offenses.

Q How many people participated in that entire selection process?

A One.

Q What did you do with those cases that were reduced from something that had started out to be felonious property offense and reduced down, or pled something else?

A This is the crime for which the individual was incarcerated, found or convicted and incarcerated.

Q How many of those crimes did you check and see what the actual offense was? You went by convictions, I take it, correct?

A Yeah, I--you see, this--I'm not sure I understand whether you are talking about plea bargaining down to a felony?

Q No, sir. I'm asking you this. You say you went by convictions, is that correct?

A By those incarcerated. Only persons incarcerated.

Q So you didn't interview anybody and take into account anybody maybe not receiving an active sentence for what they had done, is that correct?

A That's correct.

Q All right. Suppose you have somebody charged with a violent property offense who received an active sentence and you also came across a folder where someone did not receive an active sentence. How did you make your explanation for that?

A The folder wouldn't be there. These are all people incarcerated.

Q Let me ask you, what is the difference between second

degree murder as you know it to be, and, say, first degree manslaughter?

A The degree of intense and the degree of--it's essentially a judgment made by the judicial process, and there is no specific formula, for example, to determine first degree manslaughter from second degree murder. The second degree murder, for example, is, as you know, a residual category in the statutes.

Q Well, may I ask you, what did you do, what kind of allowance did you make for people who had originally been charged with first degree murder and pled guilty to second degree murder or first degree manslaughter?

A Whatever they were incarcerated for. We did not review the judicial process. We weren't concerned as much with the technicalities of the difference between second degree murder and first degree manslaughter, as we were in what caused this person to get into this kind of difficulty. So the intricacies of the process were of less concern. We did want to separate violent offenders from non-violent ones.

Q Let me ask you this. You say there were two other graduate students helping you in this. Is that correct?

A Yes.

Q Who defined stressful life events?

A The Dolran and Dolran Psychiatric Epidemiological Inventor

was used, which includes 120 items, to which we added items that occurred in childhood not in the original scale.

Q So you used this Dolran and Dolran, is that correct?

A Yes, sir.

Q What basis do we know that there was any objective formula for determining it in Dolran and Dolran?

A Dolran and Dolran are among the foremost authorities in stress research in the world and their work has been published extensively. We could go into all the methodological reasons why theirs is considered to be legitimate, but it's generally accepted in this field--

Q You used their formula?

A --yes, as being--

Q Let me ask you this, who decided whether or not an individual had killed someone close, as you said?

A Well, the criteria there were whether the person was a family member or, secondly, a close friend.

Q How could you tell--let me ask you--from looking at the records, whether a person had killed a close friend? I assume the name on the records, "killed Joe Jones or John Doe," wouldn't it?

A No, usually they go into the details of the crime and describe somewhat about the relationship between the victim and the defendant. Much of this appears in the court report as well as in the police investigation. It's not just simply

a name, A killed B, but the nature of the relationship between the two.

Q So you are depending upon whatever some officer may have thought the crime was about whenever he investigated to make a determination whether someone was close or not, aren't you?

A Not totally. That's part of the evidence. And then the information gathered in the, by the Department of Corrections and the social history by the pre-sentence reports, all of these pieces of information were fitted together.

Q You described you know about criminology and so forth, is that correct?

A Pardon?

Q You know about criminology and--

A I teach a course in criminology.

Q Yes. So what you have just told me is about triple or quadruple hearsay upon which you based your definition of what was close.

Q No, I wouldn't agree to that at all.

Q Let me ask you this. How many of those 270 people did you personally go to and say, "Hey, look, I know you killed X. Was he a close friend of yours or not?" How many of those people did you ask that?

A We didn't talk with any of the subjects.

Q So there again you are relying strictly upon the Department of Corrections' records?

A We were relying on the evidence, all the information gathered by the State of NOrth Carolina on the individual, including the court report.

Q How about this, suppose a person, the indication was that he had killed a family member, is that correct?

A Well, it would have it, yes.

Q Were there situations where that was indicated, he had killed a wife, spouse, sister or brother, whatever?

A Yes.

Q How do you make a determination between those individuals who had killed a family member, say spouse, and had killed a family member who they were not close to?

A It's just a family member. It doesn't matter how close they are. If it was a spouse that was recorded, but if it was a brother-in-law or a child or an uncle, it was recorded as a family member.

Q So whether or not that had any significance insofar as whether they were close to those people or not, you don't know, do you?

A Well, family members were grouped together and close friends. And how--

Q How many of those people did you determine maybe when they were killing this person knew whether or not they were even a close friend, accidental or otherwise? Say manslaughter cases. How many of those people knew they were eve

killing a close friend?

A I would say the vast majority knew the person whom they were killing.

Q How do you know that?

A Well, they were not killing someone that they didn't recognize, for example.

Q How do you know that?

A By the evidence in the report stating the circumstances in which the crime was committed. Two people were arguing with one another, which is very typical. They knew that person with whom they were arguing.

Q You are saying if evidence showed you in that report that a person killed someone with whom he was arguing, you assumed that that person was close to them, is that what kind of research you did?

A No. No, that's not what I said. I said they knew that person, meaning that they knew that person's name or they knew that person from a total stranger. Now, that's different from knowing that the person was a close friend, which I believe is what you were trying to get at.

Q So my question then, the bottom line, is how did you determine those who were close friends and those who they just knew their names?

MR. ROYSTER: Well, Judge, I've got to OBJECT. I think he has answered that about three times.

COURT: OVERRULED.

Q Maybe I am not understanding you.

A Okay. The--part of the report has to do with the circumstances of the crime, and in the circumstances of the event it lists the participants and it lists what did in fact occur. Part of the narrative which comes from the police and comes from subsequent investigations, and in fact comes from the mouth of the inmate himself in a separate piece of the report, has to do with how well you knew the individual. I mean this was someone with whom they had associated extensively in the past, someone with whom they had interacted with over a course of time, we can assume that they were more than passing acquaintances.

Q Let me ask you this. I understood you to say that homicide offenders tend to experience more stressful life events, is that correct?

A Okay, let me explain the different--what significantly more means. Significantly more, statistically means that stressful life events significantly, were experienced significantly more by homicide offenders than non-violent offenders, meaning that this difference could not come about simply by change; that that significance is a statistically, statistical term, and that "tended to" is misleading. Absolute, positive difference.

Q My question was, if you would just answer yes or no now

that you have explained it, did you say homicide offenders tend to experience more stressful events? Did you say that?

A Just now?

Q Earlier on direct examination. Did you not say that, sir? Is it not in your report, in fact, homicide offenders tend to experience more stressful life events? That's all I'm asking?

A Okay.

Q Did you not say that?

A I may have said that.

Q Is that in fact not in your report?

A If it is it's not the complete difference--

MR. BOWMAN: Your Honor, may I approach the witness?

COURT: You may.

Q Mr. Humphrey, on page 3 of your report, do you recall that you set out the hypotheses in which you are interested in in this whole report, is that correct?

A Yes, sir.

Q And your number one hypothesis, would you read that number one there, please, sir?

A Okay.

Q Would you please just read it? And you may explain it if you please.

A The hypothesis is the--I'm going to read it first and then explain it.

Q Read number one there right now.

A "Criminal homicide offenders tend to experience more"--

Q Please read slowly.

A "Criminal homicide offenders tend to experience more stressful life events prior to the murder than non-violent felons prior to the commission of a property offense." That's the hypothesis.

Q "Tend" is the word, is that correct?

A Yes.

Q Well, now, in your--

A Second--

MR. ROYSTER: Let him explain, Your Honor.

A That's the hypothesis, that's not the conclusion of the study. When you hypothesize something you say, "We expect to find this to be the case." The conclusions are what you actually found. Now, you cannot state a hypothesis as a conclusion. Obviously that would be erroneous. So a hypothesis says something that you expect to find, the conclusion is in fact what you did find. What we did find was there were in fact significant differences between criminal homicide offenders and non-violent felons.

MR. BOWMAN: Your Honor, may I approach again?

COURT: Yes, sir.

Q Would you say that your conclusions are contained in your summary? The summary is where you put your conclusions,

is that not correct?

A The conclusions are also found in the findings of the paper.

Q Would you also say those are included in the summary? That just happens to be what I'm looking at now.

A Not totally. Summary is more of a general statement based on the findings. The findings are more explicitly what was in fact found.

Q If you would, sir, read this first line of this paragraph of the summary slowly.

A Okay, this is the summary.

Q Just the line I pointed out here.

A "Further, homicide offenders who victimize members of their own family or close friends are more apt to have experienced considerable loss throughout their lives."

Q All right, sir. The term is "more apt to have," is that correct?

A That's in the summary.

Q Who defines what considerable loss is in that summary?

A That's based on the finding that there was significantly more loss.

Q You used a while ago the term that your findings were absolute. Are you telling this court that in every case where a person has committed homicide against a close--whatever that is--friend or a family member, that that person,

absolutely, in every single case, has experienced what you consider to be considerable loss during his childhood or otherwise?

A I think that--

Q You say that happened in every case?

A I think there are two issues here. Absolute--

Q Please answer, and then explain. Please answer yes or no, and then you may explain.

A Well, the--no. The answer to that question is no, I cannot answer that question, because initially you are talking about the absolute difference, meaning the statistical, the meaning of statistical significance, means that this difference could not come about by chance. The second part of that, do they contend to have more loss, based on the findings that is true. That is true. That doesn't mean each and every one. It means that as a group, the group tends to experience more loss. There may be people in that group that do not, but as a group there is a significant difference between homicide offenders as a group and non-violent felons as a group, and that's all that's being said.

Q And you are admitting, then, that within that group you are talking about there may be those homicide offenders who have not experienced any such loss. Is that right?

A That's possible.

Q So what you are telling is that you are not telling us

that this finding is absolute at all, isn't it?

A Meaning applying to each and every case of the group?

Q Yes.

A Applying to each and every case of the group, no.

MR. BOWMAN: May I approach one more time?

COURT: You may.

Q You answered me about, that what you had found in your findings, that was more conclusive, is that correct?

A Findings--

Q Findings being the more conclusive than the summary, is that correct?

A Uh, huh.

Q Would you please read the first line of your first finding?

A Okay. "Table 1"--this is under findings--"Table 1 provides support for the first hypothesis."

Q As you read a while ago, that was the first hypothesis, correct?

A Uh, huh.

Q Continue on reading.

A "And the first hypothesis is that criminal homicide offenders tend to experience more stressful life events than do non-violent felons."

Q So that's exactly what your hypothesis was, isn't it?

A And the table 1 provides support for the hypothesis.

Q And in your findings, just as you had used in your hypothesis, you said that criminal homicide offenders tend to experience, didn't you?

A That's a restatement of the hypothesis. I think there's a semantic problem. And all that was done here is say, Table 1 finds support for hypothesis, the first hypothesis, which is a restatement of the hypothesis.

Q Let me go forward and say you also found there to be, you say, "there are exceptions to this," is that correct?

A Exceptions to the--

Q To the findings. You have listed exceptions to your own findings. Correct?

A Sure.

Q Those being the overall loss of roles, recent losses, and past non-stress losses. So now you are telling us there are exceptions to what you have said to me is an absolute hypothesis in your finding, isn't that correct, right here in your own report?

A Yeah, there are qualifers of--

Q Qualifers, you say?

A Just as the findings don't apply to each and every case--

Q Let me ask you this, you talked to Mr.--

A That's what that means.

Q Excuse me. You talked to Mr. Boyd in person, did you not?

A Yes, sir.

Q So right at the outset you were performing an analysis based upon a technique you had not used at any time prior to this. You never talked to any of the others, did you?

A I never talked to any others.

Q So the technique you were using on Mr. Boyd was a technique you had used--that was the first time you had ever done that, isn't it?

A Technique?

Q By talking to him personally, that was a technique you had not used prior to this time, isn't that correct?

A Right.

Q You talked to him for one and one-half hours?

A Approximately.

Q Let me ask you this, how do you know what he told you was the truth?

A There are things that he said that were also, that I had also heard about Mr. Boyd prior to my meeting him.

Q These things you had also heard--

A Things that were stated to me as being background information.

Q My question is, then, how do you know what he told you was the truth?

A Because what he said was consistent with previous knowledge

Q Is that the test sociologists apply to their research,

allegedly empirical research, that what has been said or what has been found is consistent with something else you may have heard or may have seen in some other report? Is that your test, sir?

A No, I wasn't applying to Mr. Boyd's case in attempting to provide validity for sociological research.

Q Isn't that your test, as I stated, that you apply what you hear to something else you may have heard?

A That consistency seems to support what he said.

Q Would you say that that would be any scientific data that could be relied upon, other than being a consistency?

A I'm not saying that's conclusive.

Q You are not saying it's conclusive?

A It is, it tends to make one think that what he is saying is true.

Q Mr. H. Arey, one other thing that interests me about your report is this. I will explain my question and then ask a question if I may. Correct me if I'm wrong. You compared homicidal felons to other property damage felons, is that a simplified statement?

A Yeah.

Q Why is it that you didn't compare homicidal felons to just us regular folks out here? You are comparing A with B, instead of A with X, regular people who don't get put in jail for killing people. Isn't that true. You are comparing

a closed set of people.

A Yeah. First of all, the--

Q Is that correct? Just tell me if that's correct or not. I may have been mistaken.

A It is correct that I didn't compare with the general public.

Q So for what you know is, the people who you compared this with, the people who have committed homicidal acts, you cannot say in fact that even by your own study, taking it as true, you can't say for a fact that they have experienced anything that is significantly different from any of what all of us may have experienced, in our life. Isn't that true?

A Yes, because there is no reason to believe to generalise from burglary offenders to the general public. However, it's perfectly scientifically sound to, it is a classical experimental design to take something that you know, the violent offenders, and compare them with someone that has an absence of violence. And those felons, those property felons, were selected because they had no history of violence.

Q Let me ask you--

A The issue was what separates violent people from non-violent people. I wouldn't know, for example, if I compared with the general public, that I was not asking people who were violent who had never been caught. So this same fallacy

by doing it the second way is there.

Q The fact is that you had no, what is in scientific circles, I'm told, you had no control group, did you? You were comparing oranges and tangerines, rather than oranges and apples, weren't you?

A The control group is the group that does not experience that which you are attempting to explain. What we are interested in is violence. The control group is a non-violent group. The non-violent group were the property offenders. So we did have a control group, a very good control group, a comparable group, we felt. They were both felons. The difference meaning one was violent, one was not.

Q My question is this, how do you know that based upon all of your study that these 270 people experienced any more stress in their life than any 270 people you might go out here on the street and randomly pick out? How do you know that, if you do?

MR. ROYSTER: Well, objection, Your Honor.

A That's not the issue. That wasn't what we were interested in.

COURT: OVERRULED.

Q That's not what you were interested in? These felons you compared the violent felons to, do you know, did you look back and see whether or not they had committed violent acts prior to being incarcerated for the non-violent felony?

A Yes. We looked--the information there was the previous arrest record of the inmates; if they had been arrested for a violent offense in the past they were not included in the group. We attempted to exclude all violent offenders from the control group, meaning the control group was essentially, was as much as possible non-violent. Now, relying on that information going to the Department of Corrections.

Q Let me ask you this, you said on direct, too, that to lose someone, you discovered from your inquiry and your research, to lose someone depresses you. Is that what you said?

A That's a typical reaction of people who lose things, is to become depressed.

Q Would you say that reaction is any different from homicidal offenders than it is from anybody else in this courtroom?

A No, that's typical of lost people.

Q You also said that people in Mr. Boyd's--after you talked with him he fit right in that category of people you expected to want to kill someone close to them, is that correct? Is that a simplified way of what you said, in your opinion he fits within this stressful category? Of wanting to kill a close person because it represented somebody, or himself? Is that what you said?

A I'm not sure I understand that.

Q Let me rephrase it. Did you not say that after talking

with Mr. Boyd, he fell within that group of people that you would expect, having done your study, to want to kill someone close to them because at that moment he was trying to destroy himself? Is that a fair, simple statement of what you said?

A That's a--Mr. Boyd being typical of those people who kill those closest to him.

Q Because he wanted to destroy himself, is your further premise, is that correct?

A Yes, there are elements of self-destruction.

Q Tell me, if you please, what is it that you have learned from your study that can explain his testimony this morning that he wanted to kill total strangers, he wanted to blow up the police department, he wanted just to kill anybody he could think of to kill? How do you explain that?

A How do I explain outward aggression on his part?

Q No, sir. I'm saying how did, what caused him to come out of that little slice you just put him in and say all those kinds of things?

A Seems that while Mr. Boyd testified to the fact that he wanted to kill everyone, he wanted to avenge his rage outwardly, he also wanted to avenge it inwardly as well. So it portrays a very confused individual.

Q I'll ask you, who prepared these papers that appear here in this?

A I can't see that.

Q Well, I'm not referring to any--

MR. BOWMAN: May I approach, Your Honor?

COURT: You may.

Q Who prepared these little-bitty numbered tables here?

A I did.

Q All right. All the tables that are in here?

A Uh, huh.

Q This one?

A Uh, huh.

Q And you didn't take any of these tables out of Dolran and Dolran or anybody else that you read?

A No, sir.

Q Now, I notice that you list as references two pages worth of references and publications you relied upon, is that correct?

A Yes.

Q So you are taking, I take it, at least some degree of what you have determined in your research from all these other people who have done similar tests, is that not correct?

A No. The findings--

COURT REPORTER: Just a minute, I need to change paper.

COURT: Well, it seems to me it's about time for the afternoon recess. The Court Reporter has been under some pressure to keep up with you folks. I think we ought to give

her a break. Will you bring the jury out?

Step down a minute.

(The witness leaves the stand.)

(The jury comes into the courtroom.)

COURT: Members of the jury, back last week I told you that you are the judges of the facts, and you are, and that I am the judge as to the law. And during the course of the trial it is sometimes necessary to conduct hearings to determine whether certain evidence or testimony may properly be heard by you or whether it should not be heard by you. This hearing and this determination has to be performed or conducted outside of your presence. If, for example, the determination is made that you should not hear it and you have already heard it, we would have wasted that time. We are in the process of such a hearing. You haven't been at it, but we have, and particularly the Court Reporter who has been really going hard at it. I'm going to take the afternoon break at this time and I would like to make it a ten-minute break if we can in order that we may try to get the evidence at least concluded today.

Please remember the cautions that I have given to you, that you are not to talk to anybody about the case nor allow anybody to talk to you about it, or to talk among yourselves about it.

Court will be in recess for ten minutes.

--SHORT RECESS--

COURT: Members of the jury, I have got to ask you, in order that we may have a full record, please go back to your jury room.

(The jury leaves the courtroom.)

COURT: Let the witness return to the stand, please.

(Mr. Humphrey returns to the stand.)

COURT: Mr. Bowman, have you finished your cross examination?

MR. BOWMAN: Just one more question, Judge, if I may.

VOIR DIRE, continued: By Mr. Bowman:

Q Mr. Humphrey, state whether or not you remember being called to testify in a court of law as an expert witness in the field in which you just told us about?

A No.

Q Thank you. That's all.

COURT: Any further questions, Mr. Royster?

MR. ROYSTER: No further questions on redirect, Your Honor.

COURT: You may step down for a minute.

(The witness leaves the stand.)

COURT: I advised the attorneys that I would like to have a specific statement, number one, of the purpose for which this witness is called by the defense attorneys, and any argument you may have in support of that, and number two,

the objections by the District Attorney for the State and any arguments for that.

Mr. Royster?

MR. ROYSTER: Yes, sir, Your Honor, we are tendering Professor Humphrey as an expert in the field of sociology and criminology and, Your Honor, I would like to Xerox, I have one copy here, Xerox his qualifications and tender those to the Court and make it part of the record. I went over some of it with him and I would like to tender that in now.

COURT: And specifically you are asking that he be allowed to testify as to what?

MR. ROYSTER: Your Honor, he has conducted a test, or study, as he has indicated, of a number of people who are incarcerated in the North Carolina Department of Corrections. He has divided this group into violent offenders and non-violent offenders. One of his findings, Your Honor, which he says has significant, or is of significant evidence, is that the violent offenders have tended to, or have had this type of loss, what we call stressful life events, loss of, for instance, fathers, or loss of grandfathers, or family members early in their life, and that this was something commonplace among those people who were incarcerated in the North Carolina Department of Corrections as a result of having committed some type of violent criminal act. He also finds those stressful life events to be of significant value

or to be in significant number among those offenders who have taken the life of a close personal friend or of a family member, someone they knew, as opposed to those violent offenders who kill someone that they did not know.

Now, Your Honor, the evidence has already shown that Mr. Boyd lost his father at an early age. He testified to that, so did his mother. That he lost his grandfather at an early age. That he has had numerous jobs; that he has had loss of friends, things of this nature, which Professor Humphrey has indicated are the same type of stressful life events that he found among these other violent offenders.

Now, Your Honor, that gives credibility, and that gives some credence to the submission to the jury of any mitigating circumstance involving Mr. Boyd where he lost his father at an early age and he lost his grandfather at an early age. It gives credibility to it, Your Honor. It gives weight to it. As to how much weight it's going to be given, we submit to the Court that that is a question for the jury, that this evidence ought to be admitted and that it ought to be, of course, subject to the cross examination of the District Attorney and then the weight, if any, given to it would be up to the jury to decide.

COURT: Objection of the State?

MR. BOWMAN: Yes, Your Honor, the State does object, Your Honor. May I be heard briefly?

COURT: Yes, sir.

MR. BOWMAN: Your Honor, the State concedes that there has already been evidence offered that Mr. Boyd may have had a disruptive childhood; that his father died at an early age--his grandfather, excuse me; that his father left home. All that may or may not be seen as mitigating circumstances to the jurors. I concede that may very possibly. However, I don't see what it adds to it to have Mr. Humphrey get on the stand and say 270 other people that he has never talked to, nor any of his staff ever talked to, also may or may not have had some stressful life events. I don't think the data he has compiled has been done in a scientific fashion. Whatever it is that he has determined talks about "tending to," Your Honor. He has not established that his field is even one of those fields generally accepted as being considered by the courts as relevant or empirical type information. I contend to the Court that whatever 270 other people may have done in their lifetime has no bearing whatsoever. Even if it is determined that Mr. Boyd fits into this same group that they fit into, the fact that he does, Your Honor, does not make this particular murder any more or less mitigated. The fact that they did, or the fact that he did, so what? What the jurors are interested in, what about Mr. Boyd? What about Martin Arthur Boyd must we consider to see whether or not there are mitigating circumstances

They are not interested in what 270 other people may or may not have done in their life. Even so, Mr. Humphrey admitted himself, he doesn't know for sure that everyone within the 270 experienced these stressful life events. He said as a group they did. I don't know what of the group is it, if half of 270 plus one did? Is that what a group does, Your Honor? Does Mr. Boyd fit in with the 270 or half of that, or the one less than half? There is nothing about this, Your Honor, that could be determined scientific by any respects, I contend. He did not voice an opinion about what his opinion was, how that affected it, or how that mitigated it. So my response is, if we take, given, yes, Mr. Boyd experienced these events, these 270 people also did. My response is, so what? What does that show the jurors? Nothing. Nothing at all. Thank you.

COURT: The objection to the testimony of this witness is SUSTAINED. Record the EXCEPTION of the defendant. EXCEPTION NO. [illegible]

Is there other evidence to be offered by the defendant?

MR. ROYSTER: There is, Your Honor. At this time, though, I would like to tender into the record on behalf of Mr. Humphrey's testimony, a copy of the report, the study that he did.

COURT: Well, in chambers a moment ago, I thought you told me that you were not offering the report.

MR. ROYSTER: Well, Judge, I'm not offering it to

the jury, but I want to get it in the record so the Court can look at it.

MR. BOWMAN: Your Honor, the State would OBJECT to the report. It has not been properly identified as the work of this witness. There are many, many cites to other works and so forth.

COURT: Well, I have not seen the report. If you are offering it, do you want me to look at it?

(The paper writing is handed to the Court.)

MR. BOWMAN: Your Honor, I believe it's already been stated that no such report was to be offered to the jurors.

MR. ROYSTER: Judge, I'm not offering it to the jury. They are not out here.

MR. BOWMAN: Your Honor, that being the case, then I would like a statement on the record that was not to be offered to the jury, that being the case.

COURT: Well, now, the copy that's tendered to me has a cover page, a first page, and then there is a second page inserted which does not appear to be page 2.

MR. ROYSTER: Judge, that's correct. [illegible] abstract that is out of place with the introduction. The introduction should be page 1, the abstract should be prior to that, Judge. It was misplaced. That was my fault, Judge.

COURT: All right. And the underlined portions or sentences which are underlined were underlined by you?

MR. ROYSTER: They were, Your Honor. Yes, sir.

MR. BOWMAN: Your Honor, before the Court rules on that, I would like to be heard just briefly, if you will permit it.

COURT: Well, I have not seen this before and there are a number of pages here, and I felt that I ought to in all fairness try to see what it says before I made my final ruling on it. Let me look a little further.

(Brief pause in proceedings.)

COURT: The Court will allow this to be marked as defendant's exhibit and put into the record, but the Court's objection, or the State's objection has been SUSTAINED. Now, what number do you want to put on this? EXCEPTION NO

MR. ROYSTER: Judge, that would be defendant's number 1.

MR. BOWMAN: Your Honor, the State would still request that they stipulate whether or not this was to be offered for the jurors or whether it's just in for the record.

COURT: The statement was made by counsel earlier that it was not to be offered to the jury.

MR. ROYSTER: Yes, sir. Thank you.

COURT: But is to be put into the record. Am I correct, Mr. Royster?

MR. ROYSTER: That's correct, Your Honor. I'm not asking for the jury to look at that.

COURT: The Clerk will please mark that as received for the record.

Bring the jury back.

(The jury enters the courtroom.)

DEFENDANT'S EXHIBIT 2

VITA

John A. Humphrey
Associate Professor
Department of Sociology
The University of North Carolina at Greensboro

Institution and Location	Degree	Year Conferred	Field of Study
St. Anselm's College, Manchester, N.H.	B.A.	1966	Sociology
University of New Hampshire, Durham, N.H.	M.A.	1969	Sociology
University of New Hampshire, Durham, N.H.	Ph.D.	1971	Sociology

Academic Positions:

Associate Professor of Sociology, The University of North Carolina at Greensboro, 1976-Present
Assistant Professor of Sociology, The University of North Carolina at Greensboro, 1973-1976
Lecturer in Sociology, The University of North Carolina at Greensboro, 1972 (Fall)

Administrative Positions:

Director, Center for Social Research and Human Services, The University of North Carolina at Greensboro, 1976-

Awards:

Post-Doctoral Research Fellow, Family Violence Research Program (NIMH)
Alpha Kappa Delta
NSF Fellowship 1970-71
NDEA Fellowship 1968-69
Ford Foundation Fellowship 1966-67

Publications:

Books

A Panorama of Suicide (with C. Donald Alexander and Thomas Casey) Springfield, Ill.: Charles C. Thomas Publisher, 1973.

The Administration of Justice (with Michael Milakovich) New York: Human Sciences Press, 1981.

Deviant Behavior (with Stuart Palmer) (Nearing Completion)

Correspondence Course

Corrections and Penology (with Marilyn Hicks)-an independent study course prepared for Independent Study by Extension Division, University of North Carolina, Chapel Hill, 1977.

Articles:

Bernard E. Segal and John A. Humphrey, "A Comparison of Suicide Victims and Suicide Attempters," Diseases of the Nervous System 31(12): 830-839, 1970.

John A. Humphrey, et al., "A Comparison of Suicide Thinkers and Attempters, Diseases of the Nervous System 32 (12): 825-830, 1971

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"Social Loss: A Comparison of Suicide Victims, Homicide Offenders and Non-Violent Individuals," Diseases of the Nervous System, 38(3): 197-160, 1977. (Abstracted by Human Behavior, February 1978).

Stuart Palmer and John A. Humphrey, "Suicide and Homicide: A Test of a Role Theory of Destructive Behavior," Omega, 8(1): 49-58, 1977.

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John A. Humphrey and Harriet J. Kupferer, "Pockets of Violence: An Exploration of Homicide and Suicide," Diseases of the Nervous System 38(10): 833-837, 1977.

John A. Humphrey, "A Study of the Etiology of Sociopathic Behavior," Diseases of the Nervous System 35(9): 432-435, 1974.

"Role Interference: An Analysis of Suicide Victims, Homicide Offenders, and Non-Violent Individuals," The Journal of Clinical Psychiatry 39(8): 652-655, 1978.

John A. Humphrey and Stuart Palmer, "Homicide and Suicide in North Carolina: An Emerging Subculture of Self Violence?" in James Incardi and Anne Pottieger, eds., Violent Crime: Historical and Contemporary Issues, Sage, 1978, 99-110.

Linda Ketner and John A. Humphrey, "Homicide, Sex Role Differences and Role Relationships," Omega 10: 179-187, 1979-80.

E. Page Hudson, John A. Humphrey and Harriet J. Kupferer, "Regional Variations in the Characteristics of Victims of Violence," The International Journal of Social Psychiatry 26: 300-308, 1980.

Stuart Palmer and John A. Humphrey, "Victim-Offender Relationships in Criminal Homicide Followed by Offender's Suicide," Suicide and Life Threatening Behavior 10: 109-119, 1980.

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Gallion E. Knox and John A. Humphrey, "The Granting of Work Release," Criminal Justice and Behavior 8(1): 55-77, 1981.

John A. Humphrey, Steven Cosgrove, E. Page Hudson, "Known Who Are Murdered: An Analysis of 912 Consecutive Victims," Omega 12(3): 261-269, 1981-82.

Sheryl Kumale and John A. Humphrey, "Murder of the Elderly: An Analysis of Increased Vulnerability," Omega 13(1): 27-36, 1982-83.

John A. Humphrey and Stuart Palmer, "Stressful Life Events and Homicide Offender-Victim Relationships," Victimology 5(1-4): 115-120, 1982.

John A. Humphrey and Harriet J. Kupferer, "Homicide and Suicide Among the Cherokee and Lumbee Indians of North Carolina," International Journal of Social Psychiatry 28 (2): 044-052, 1982.

Articles Continued:

Stuart Palmer and John A. Humphrey, "Familial and Other Relationships in Criminal Homicide in North Carolina," Journal of Family Issues 3 (3): 301-318, 1982.

Reviews:

Juvenile Delinquency: Little Brother Grows Up by Theodore N. Ferderand, Beverly Hills, CA: Sage, 1977, in Contemporary Sociology 9(6): 805, 1980.

The Science of Murder in Science Books and Films, American Association for the Advancement of Science 17(4): 227, 1982.

Shoot/Don't Shoot in Science Books and Films, (forthcoming)

Papers Presented at Professional Meetings

"A Comparison of Suicide Attempters and Thinkers: Interim Findings," a paper read at the annual meeting of the American Association of Suicidology, San Francisco, CA, March, 1970.

"Identification of the High Risk Suicide Groups in New Hampshire," a paper read at the Second New Hampshire Symposium on Suicide, Concord, New Hampshire, October, 1970.

"The Process of Suicide: The Sequence of Disruptive Events in the Lives of Suicide Victims," a paper read at the annual meeting of the American Association of Suicidology, Detroit, MI, April, 1972.

"Homicide and Suicide: A Synthesis of Theory," (with Stuart Palmer) at an American Sociological Association Roundtable in New Orleans, LA, September, 1972.

"A Study of the Etiology of Sociopathic Behavior," a paper read at the annual meeting of the Southern Sociological Association, Atlanta, GA, April, 1973.

"Social Loss and Suicide," a paper read at the annual meeting of the American Association of Suicidology, Jacksonville, Florida, April, 1974.

"Criminal Justice Para-Professional Internship: A Model for the Practical Application of Sociology Courses," presented at the annual meeting of the Southern Sociological Association, Atlanta, GA, April, 1974.

"Pockets of Violence and Their Socio-Cultural Correlates," (with Harriet J. Kupferer). A paper read at the 34th annual meeting of the Society for Applied Anthropology, Amsterdam, Holland, March 19-23, 1975.

"Homicide and Suicide Among the Indian Populations of North Carolina," (with Harriet J. Kupferer). A paper read at the annual meeting of the Southern Anthropological Society, Clearwater, Florida, April, 1975.

"Patterns of Violence: A Regional Analysis of Homicide and Suicide in North Carolina," (with Harriet J. Kupferer). Annual Meetings of Southern Anthropological Society, Atlanta, March, 1976.

"Regional Variations in the Characteristics of Victims of Violence," (with R. Page Hudson and Harriet J. Kupferer) Second International Symposium on Victimology, Boston, August, 1976.

"A Comparison of Homicide and Suicide Victims in North Carolina During 1972-1973," (with Stuart Palmer) Second International Symposium on Victimology, Boston, August, 1976.

"Youthful Suicide and Homicide Victimization: An Analysis of Social Structural and Situational Factors," Annual Meetings of American Association of Suicidology, Boston, May, 1977.

"Three Preliminary Studies in Vandalism: England-Wales, North Carolina, and 5 Non-Literate Societies," (with Stuart Palmer) International Congress on Vandalism, Ramat-Gan, Israel, December, 1977.

"Patterns of Black Suicide Victimization in North Carolina, 1972-1976," (with Bernard Douglas). Annual Meetings of the American Association of Suicidology, New Orleans, April, 1978.

"Trends and Patterns in Homicide and Suicide Victimization in the Two Major Populations in North Carolina: The Cherokee and Lumbee," (with Harriet J. Kupferer). Annual Meeting of the Southern Anthropological Association, Lexington, Kentucky, April, 1978.

"The Granting of Work Release," (with William E. Knox). Annual Meetings of Society for the Study of Social Problems, San Francisco, September, 1978.

"Police Suicide Victimization in North Carolina: 1972-1976," (with Steve Cosgrove). Annual Meetings of American Society of Criminology Dallas, Texas, November, 1978.

"An Analysis of 912 Female Homicide Victims," (with R. Page Hudson and Steve Cosgrove). Annual Meetings of American Academy of Forensic Sciences, Atlanta, February, 1979.

"Criminal Victimization, Anomia, and Unreported Crime," (with Benjamin Calloway). Annual Meetings of the Academy of Criminal Justice Sciences, Cincinnati, March, 1979.

"Victim-Offender Relationships in Criminal Homicide Followed by Offender's Suicide," (with Stuart Palmer). Annual Meetings of American Association of Suicidology, Denver, May, 1979.

"Suicide Among the Young: An Epidimological Analysis of 347 Consecutive Victims," (with Susan Joyce). Annual Meetings of American Association of Suicidology, Denver, May, 1979.

"Military Suicide Victimization: Durkheim and Beyond," (with Steve Cosgrove). Annual Meetings of American Association of Suicidology, Denver, May, 1979.

"A Time to Die: Recent Suicide Trends Among the Old in North Carolina," (with Sheryl Kunkle), Annual Meetings of American Association of Suicidology, Denver, April, 1979.

"Too Old to Live, Too Young to Die: An Analysis of Vulnerability of the Elderly for Suicide," (with Sheryl Kunkle), Tenth International Congress for Suicide Prevention and Crisis Intervention, Ottawa, Canada, June, 1979.

"Changing Patterns of Criminal Homicide Victim-Offender Relationships in North Carolina," (with Stuart Palmer), Roundtable Session, Annual Meetings of the American Sociological Association, Boston, August, 1979.

"Murder of the Elderly: An Analysis of Increased Vulnerability," (with Sheryl Kunkle) Annual Meetings of the American Society of Criminology, Philadelphia, 1979.

"Anticipated Life Events and Mode of Death Among University Students," (with Harriet J. Kupferer). Annual Meetings of the American Association of Suicidology, Nashville, April, 1980.

"Familial and Other Relationships in Criminal Homicide," (with Stuart Palmer). Annual Meeting of American Sociological Association, New York, September, 1980.

"Stress and Criminal Homicide Offender-Victim Relationships," (with Stuart Palmer). First World Congress of Victimology, Washington, D.C., August, 1980.

"Stressful Life Events and Degree of Familiarity Between Homicide Offender and Their Victims," (with Stuart Palmer). Annual Meetings of the American Society of Criminology, San Francisco, November, 1980.

"Suicide and Homicide Rates as Predictors of Who Kills Whom." (with Stuart Palmer) American Association of Suicidology, Albuquerque, New Mexico, April, 1981.

"Stressful Life Events and Inter and Intra-Familial Murder," (with Stuart Palmer) presented at the National Conference on Family Violence, Durham, New Hampshire, July, 1981.

"Stress and Criminal Homicide," (with Stuart Palmer) Organizer: Roundtable Discussion American Sociological Association, Toronto, Canada, September, 1981.

"Stressful Life Events and Inter and Intra-Racial Criminal Homicide," (with Stuart Palmer) presented at the annual meeting of the American Society of Criminology, Washington, D.C., November, 1981.

"Race, Sex, and Undergraduate Intoxication," (with Virginia Stephens and Donald Allen) presented at the annual meeting of the Society for The Study of Social Problems, San Francisco, September, 1982.

"Stress and Criminal Homicide," (with Stuart Palmer) presented at the National Conference on Social Stress Research, Durham, New Hampshire, October, 1982.

Teaching Activities

Courses Taught at UNC-Greensboro

Sociology 211 - Introductory Sociology
Sociology 222 - Sociology of Deviant Behavior
Sociology 317 - Criminal Justice*
Sociology 324 - Criminology
Sociology 413 - Corrections and Penology*
Sociology 521 - Juvenile Delinquency

*I have added these courses to the curriculum.

University and Community Service

1. University Committees

University Council on Urban Studies
ad hoc Faculty Committee on the Review
the Dean of the College.
Security Committee (Annually from 1973)
Honors Council (1974-75)
Winshaw Hall, Faculty Advisor (1973-74)
Judicial Branch, SGA, Faculty Advisor (1974-75)

2. Departmental Committees

Executive Committee
Promotion and Tenure Committee
Recruitment Committee
Equipment and Facilities Committee
Graduate Committee
Undergraduate Committee
ad hoc Committee to Investigate Track II M.A. Program

3. Community Activities

Speaker, Youthful Suicide Victimization, Guilford County Professional Council for Youth, December, 1979.

Member, Board of Directors, Volunteers to the Courts, Greensboro, 1977-78.

Speaker, Self Concept, Pre-Release and After-Care Center, Greensboro, 1974, 1975, 1976, 1977, 1978.

Speaker, Sociological Causes of Delinquency, North Carolina Juvenile Justice Institute, Greensboro, May, 1977.

Consultant to: Youth Services Bureau of Greensboro

Consultant to: Volunteers to the Courts

(continued)

Community Activities (continued)

Consultant to: Alamance County Suicide and Crisis Control Center

Speaker, "A Profile of Violence in North Carolina," North Carolina Conference on Violence, Raleigh, April, 1976.

Director, Training Program, Volunteers to the Courts, High Point, North Carolina, 1976.

Member, Greensboro Task Force on Child Abuse, 1975.

Speaker, North Carolina Department of Corrections, Training Program for Correctional Officers, 1975.

Member, Juvenile Court Exploration Team, 1973-1975.

Family Life Council of Greater Greensboro

Alcohol Education Center, Jamestown, North Carolina, 1974.

APPENDIX G

"Death Qualification" Voir Dire of Prospective Juror Garland Smith, Conducted by Prosecutor James Yeats (T. 510-16)

CLERK: Garland Mark Smith.

MR. YEATTS: Mr. Smith, have you been able to hear and understand the questions we have asked the previous jurors up to this point?

MR. SMITH: Yes, sir.

MR. YEATTS: I would ask you, Mr. Smith, how you feel about capital punishment, that is the death penalty. Are you opposed to it in principle, or for any other reason, or do you believe that it is a necessary law in the State of North Carolina?

MR. SMITH: I think it's necessary.

MR. YEATTS: You believe that it is a necessary law?

MR. SMITH: Yes.

MR. YEATTS: I take it by your answer to that question that you would consider a verdict that involved the death penalty as an appropriate and necessary verdict under the appropriate facts and circumstances as the Court would instruct you?

MR. SMITH: Yes, sir.

MR. YEATTS: Could you, Mr. Smith, vote to impose the death penalty in this case if the Court so instructed you under the appropriate facts and circumstances?

MR. SMITH: I don't know, sir.

MR. YEATTS: You are not sure that you could?

MR. SMITH: No.

MR. YEATTS: Do you think that your hesitancy in answering that question would cause you to have a hard time voting or considering that verdict?

MR. SMITH: It's possible. I don't know, taking somebody's life into my own hands, that's--

MR. YEATTS: Then I take it by your answer, and you correct me if I'm wrong, that because you do have this reservation about voting in regard to the death penalty, that you could not consider the death penalty under any facts or

circumstances or instructions by the Court?

MR. SMITH: I don't really understand your question.

MR. YEATTS: In other words, if the facts and circumstances were present and the Court instructed you that those facts and circumstances were present to a legal certainty or satisfactory, could you vote to impose the death penalty?

MR. SMITH: I don't think so, not within myself.

MR. YEATTS: You don't think so. Okay. I take it what you are saying to me is that regardless of those facts and circumstances that might emerge in the course of this trial, that you are unwilling to consider and irrevocably committed against the death penalty as far as you personally are concerned?

MR. SMITH: Well, I'm for the death penalty but I just--in other words, I don't want it on my shoulders and I don't think that I could--

MR. YEATTS: Okay. Well, let me ask you one other way. Maybe I'm not very clear in the way I'm asking it, and I'll be quite frank with you, I'm going to read these questions off because this is what the law has told me to ask. Because of your feelings, in other words you believe in the death penalty, you believe that it's a necessary law--

MR. SMITH: Yes, sir.

MR. YEATTS: But you, yourself, could not consider such a verdict, you could not be part of the legal machinery

that imposed such a verdict, is that right?

MR. SMITH: Yes, sir.

MR. YEATTS: And because of those personal beliefs in yourself that you couldn't consider such a verdict then, could you?

MR. SMITH: No, I don't think so.

MR. YEATTS: I appreciate your honesty in that matter and would offer this juror for cause.

MR. ROYSTER: We would ask that we be allowed to question him, Your Honor.

MR. YEATTS: OBJECTION to rehabilitating him.

COURT: Well, let me say this to the juror. You do understand that the law of this State provides that in certain cases, commonly called capital cases, the death penalty may be imposed.

MR. SMITH: Yes, sir.

COURT: And that in such a case, a case in which the defendant is charged with murder in the first degree, the jury must first decide whether he is guilty of murder in the first degree or not. Do you understand that?

MR. SMITH: Yes, sir.

COURT: Do you have any quarrel with that law, or any question about that law?

MR. SMITH: No, sir.

COURT: If the jury has reached that verdict, and

only if the jury has found him guilty beyond a reasonable doubt, a separate stage would be conducted in this trial in which evidence could be presented by either the State or the defendant. The attorneys would again argue to the jury, this time on the question of punishment. The Court is then required to instruct you as to the law of this State and to instruct the jury on what are called "aggravating circumstances and "mitigating circumstances."

MR. SMITH: I don't understand those two.

COURT: All right, sir. If I may put it in plain language, if the jury has decided it's first degree murder, in what's called the sentencing phase of the trial, depending upon what the evidence might be at that time, the jury would be instructed to consider these things and to decide if there are factors or things involved in this act, and so far as this person is concerned, which, quote, make it worse, or if there are factors or things involved in this case or in this person which make it less bad, if I can use that term. I am trying to give you a plain, understandable definition here. The jury then goes out to decide that part of the case. The jury decides if there are aggravating circumstances which make it worse. The jury decides if there are mitigating circumstances which make it less bad. The jury must find that the aggravating circumstances which make it worse outweigh or are greater than the mitigating circumstance

And the jury then decides by its verdict whether there shall be the death penalty imposed or whether there shall be life imprisonment.

My purpose in asking this to you in this way is to ask you if you could serve as a juror, you could take the law of this State as it would be given to you by the Court, you could weigh the evidence that's presented to you, which could include evidence that is recalled by a juror from the trial itself, the original trial. Do you understand me thus far?

MR. SMITH: I believe I've got you.

COURT: All right. And then decide whether or not the jury would vote to impose the death penalty or vote to impose life imprisonment. My question to you is, could you accept the law of this State with regard to this type of case?

MR. SMITH: I think so.

COURT: Could you sit on the jury and apply that law to the evidence in this case?

MR. SMITH: That's my stopping point. I don't know.

COURT: Well, until a person hears the evidence, a person really can't say.

MR. SMITH: No, sir.

COURT: I appreciate your candor. Our inquiry now is to find out if you could do this, and I'll ask it another way. Is your mind so fixed and set on this that you could

not consider it?

MR. SMITH: I don't think so. I talked, when I first got the notice about the jury, I told my mother, I said, "I don't think I could do anything like that."

COURT: Well, having sat here yesterday and today and having heard some of the questions presented to other people in the jury box, you have considered these questions and answers given by various persons?

MR. SMITH: Yes, sir.

COURT: At this time, can you say that your mind is closed to the question of the death penalty?

MR. SMITH: In this case, yes, sir.

COURT: In this case it is?

MR. SMITH: Yes, sir.

COURT: And by that you mean, then, regardless of the evidence in the case, how strong it might be or how bad it might appear, you could not vote for the death penalty?

MR. SMITH: I don't think so.

COURT: The Court will ALLOW the challenge for cause and this juror may step down. EXCEPTION NO 55

MR. ROYSTER: Judge, we would like to ask the juror some questions.

MR. YEATTS: OBJECTION.

COURT: I'll record your objection and I am OVERRULING the objection. EXCEPTION NO 56 This witness may step, this juror may stand

down.

MR. ROYSTER: OBJECTION.

COURT: Call another person.

Selection of the Jur.

APPENDIX H

"Death Qualification" Voir Dire of Prospective Juror James Arrington, Conducted by Prosecutor Dean Bowman (T. 23-26)

CLERK: James Arrington.

MR. BOWMAN: Mr. Arrington, have you been able thus far to hear what has gone on in the front of the courtroom, what has been said by the Judge, His Honor, and what comments that I have made?

MR. ARRINGTON: Yes, sir.

MR. BOWMAN: You are aware that Mr. Boyd is charged here with first degree murder of Wanda Hartman? You have heard that?

MR. ARRINGTON: Yes, sir.

MR. BOWMAN: And you are aware of the issue that we are now discussing, that is the feelings of the jurors about the death penalty?

MR. ARRINGTON: Yes, sir.

MR. BOWMAN: All right, sir. Then I will ask you what your feelings are about the death penalty, whether or not you are opposed to it for whatever reason you may have or whether you feel it's a part of the, or a necessary law that we have?

MR. ARRINGTON: I think it's a necessary law all right but I would be hesitant to invoke it.

MR. BOWMAN: Well, let me ask you this, do you have any religious or moral scruples against the imposition of the death penalty?

MR. ARRINGTON: I do to a certain extent, yes, sir.

MR. BOWMAN: Having said that, then, and listening to your answer that you have given, I take it then that regardless of the facts that may develop in this particular case, that you are unwilling to consider the death penalty and vote to impose it in this particular case, regardless of those facts. Is that what you are telling me?

MR. ARRINGTON: That's right.

MR. BOWMAN: Tender for cause.

COURT: Let me be sure I understand you. Are you say-

you do not agree with the law of this State?

MR. ARRINGTON: It's necessary in a lot of circumstances, but--

COURT: Do you agree with it?

MR. ARRINGTON: Well, that's where I draw the line. I'm not sure.

COURT: I'm sorry, I can't hear you, sir.

MR. ARRINGTON: I'm not sure about it.

COURT: Well, I'm not asking you that, whether you are sure or not. Insofar as the law is concerned, did you understand what I said earlier, that the State is first required to prove the man guilty beyond a reasonable doubt? Do you understand that?

MR. ARRINGTON: Yes, sir.

COURT: And if the jury decides that, then there is a second stage of the trial or proceeding in which a jury decides then whether the punishment shall be life imprisonment or shall be death.

MR. ARRINGTON: That's right.

COURT: Do you agree with that law?

MR. ARRINGTON: I don't think so, sir.

COURT: You don't think so?

MR. ARRINGTON: I don't think I could do that.

COURT: I can't hear you, sir.

MR. ARRINGTON: I don't think I could stand with

that, for religious beliefs.

COURT: Would you mind telling me what denomination you are?

MR. ARRINGTON: Well, I believe in you shall not take a life.

COURT: What denomination are you, sir?

MR. ARRINGTON: Well, I don't belong to any one particular denomination.

COURT: But you say this is a religious belief of yours?

MR. ARRINGTON: Yes, sir.

COURT: And regardless of the evidence, however strong it might be, you say you could not and would not vote for the death penalty?

MR. ARRINGTON: No, sir.

COURT: Step down, sir. 15

MR. ROYSTER: Judge, we are going to ask the Court to allow us to ask questions of this juror.

COURT: Your OBJECTION is OVERRULED. Step down, sir. 16

MR. BOWMAN: Thank you for your honesty.

MR. ROYSTER: We do enter an objection, Your Honor.

COURT: You have it.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
DEC 13 1984
ALEXANDER L. STEVAS
CLERK

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO. 84-5819

ARTHUR MARTIN BOYD, JR.
Petitioner,

V

THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

RUFUS L. EDMISTEN
Attorney General

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Assistant Attorney General
N. C. Department of Justice
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II. WHETHER THE TRIAL COURT MAY CONSTITUTIONALLY EXCUSE TWO PROSPECTIVE JURORS FOR CAUSE AT A CAPITAL TRIAL, WITHOUT PERMITTING ANY DEFENSE QUESTIONING, BASED ON THE JURORS' VACILLATING AND EQUIVOCAL ANSWERS TO A SERIES OF MISLEADING QUESTIONS CONCERNING THEIR VIEWS ON THE DEATH PENALTY?

TABLE OF CASES AND AUTHORITIES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO. 84-5919

ARTHUR MARTIN BOYD, JR.
Petitioner,

V

THE STATE OF NORTH CAROLINA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 311 N.C. 405 , 319 S.E. 2d 189 (1984). It is set out in Appendix A of the Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The judgment of the Supreme Court of North Carolina was entered on August 28, 1984. On October 19, 1984, Chief Justice Burger signed an Order Extending Time to File Petition for Writ of Certiorari until November 26, 1984. A copy of that order is set out in Appendix B of the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

This case also involves sections 14-17 and 15A-2000 of the General Statutes of North Carolina, which are set out in Appendices C and D, respectively.

STATEMENT OF THE CASE

The case as stated in the Petition is basically accurate so that the State believes there is no necessity to add to it.

REASONS FOR DENYING THE WRIT

I

THE JUDGE AT THE SENTENCING PHASE OF MR. BOYD'S CAPITAL TRIAL CONSTITUTIONALLY PRECLUDED THE JURY FROM HEARING NON-RELEVANT AND REDUNDANT EXPERT TESTIMONY HE PROFFERED IN MITIGATION CONCERNING HIS UNHAPPY FAMILY BACKGROUND, HIS PSYCHOLOGICAL HISTORY AND EMOTIONAL STATE AT THE TIME OF THE OFFENSE, AND THE CONSISTENCY OF THOSE FACTORS WITH THE PROFILE OF DOMESTIC HOMICIDE OFFENDERS WHO DO NOT CONSTITUTE A CONTINUING THREAT TO THE PUBLIC.

Petitioner argues that the trial judge and the reviewing justices of the Supreme Court of North Carolina misapplied the commands of the Eighth and Fourteenth Amendments of the United States Constitution as interpreted and applied by this Court to capital cases by the recent cases of Lockett v. Ohio, 438 U.S. 586 (1976), and Eddings v. Oklahoma, 455 U.S. 104 (1982). Both of these cases, as well as the myriad of cases which have followed them, hold that it is error of constitutional magnitude for the judge to exclude from consideration by the sentencer in a capital case relevant evidence which might tend to mitigate the offense and thereby lead the sentencer to impose a penalty less than death. The State submits this argument should be rejected in petitioner's case because the proffered evidence was not relevant; because most, if not all, of this proffered evidence was before the sentencer through other witnesses and because the conclusions which were ultimately drawn by the excluded expert were neither novel, rare or unusual but, rather, were of such a usual nature as to be common knowledge to the population at large. The latter two arguments are harmless error arguments but their inclusion is in no way meant to imply that the State believes the proffered evidence was anything less than totally irrelevant; however, since relevancy is a concept with some elasticity, these latter arguments are merely intended to show that under any view the proceedings were fair and proper in every respect. Defendant, in his Petition, recognizes the rule of relevancy but seeks to stretch it beyond the bounds contemplated in the cases.

The word "relevant" has been defined in Webster's Third New International Dictionary, Unabridged, 1968 Edition, as "1. bearing upon or

properly applying to the matter at hand: affording evidence tending to prove or disprove the matters at issue or under discussion...syn: RELEVANT, GERMANE, MATERIAL, PERTINENT, APPOSITE, APPLICABLE, APROPOS can signify, in common, having a relation to or a bearing upon a matter in hand or upon present circumstances. A thing is RELEVANT when it has a connection, esp. a logical connection, with the matter under consideration...."

The same source defines mitigate as: "2. to make less severe, violent, cruel, intense, painful: SOFTEN, ALLEVIATE...TEMPER...LESSEN (a sentence of 20 days solitary confinement may be mitigated to 10 days)...."

It is in the context of the above, therefore, that the excluded testimony of Dr. Humphrey must be considered. Petitioner has set forth Humphrey's entire voir dire testimony in Appendix E. to the Petition. The thrust of this testimony as developed by petitioner's lawyer on direct examination, was that Dr. Humphrey and two graduate student assistants over a two-year period from 1979 to 1981 examined records on file with the North Carolina Department of Corrections of approximately 1000 inmates who had been convicted of either homicide type offenses or felonious property type offenses such as larceny or burglary. In the course of this study, the records of 272 homicide offenders were compared with the records of 192 felonious property offenders. For the purposes of this study, the person who examined each file noted the number and type of events considered to be stressful by Dolran and Dolran in their Psychiatric Epidemiological Inventory, as well as some childhood events, unnamed, which Humphrey considered stressful. (Thus, for example, one inmate might have been subjected to three such events while another might have been subjected to five.) Upon completion of the listing process a comparison was made between the two groups. The result of this comparison indicated the homicide offenders then incarcerated had been subjected to more such stressful events than the property offenders then incarcerated in the North Carolina prison system.

A second substudy was done in regards to the 272 homicide offenders. As explained by Dr. Humphrey: "We divided the homicides into primary homicides, those who killed family members, close friends, and the second category, non-primary, those who killed total strangers or people they merely have been acquainted with." (T p 1104) Again, a listing of stressful events as to each individual was made and again a comparison between the numbers was made. This comparison indicated that the homicide offenders then incarcerated in the North Carolina prison system who had killed family members or close friends had been subjected to more stressful events in the form of personal loss than the other group. Dr. Humphrey considered stressful events that were losses to be the death of a parent or sibling; the loss of a student role in childhood by expulsion from school; loss of close personal friends or lovers or spouses; the loss of a job; the loss of liberty; the loss of health and the loss of money.

In summary, therefore, Dr. Humphrey's study of the records of 464 inmates in the North Carolina prison system over a two-year period showed that those inmates convicted of homicides had experienced over their lifetime more stressful events than those convicted of property crimes and that an unknown number of the 272 convicted of homicides who had killed a family member or close friend had experienced more stressful events classified as "losses" than those who killed strangers.

From this data, Dr. Humphrey further concluded: "Now, one thing here is a loss has been found to be associated with or precipitate or lead to suicide over and over. The more loss in someone's life, the more likely they are to become self-destructive. And it seems that killing a family member or killing a close friend is an act of self-destruction. They are, after all, killing something that is part of them, very close to them, very important to their self. They are destroying them. So in the act of killing another person, they are in fact destroying part of their self, a self-destructive act." (T pp 1105 and 1106) Rather clearly, the above-quoted conclusion is not supported by the study of 464 inmates set forth above. The data developed from this study does not support the conclusion that loss produces self-destructive, suicidal tendencies. The most this study shows is that loss produces homicidal tendencies which result in the killing of persons in intimate relationships. Dr. Humphrey's testimony provides no clue as to what data he used to arrive at the conclusion that the homicidal tendencies produced by loss are really suicidal in nature. His study of the prison population was based solely upon an examination of the records and not upon extensive, in depth interviews of each inmate. The data developed does not provide much of an insight into the psyche of the 292 killers examined.

The other part of Dr. Humphrey's testimony consisted of a description of his interview with the petitioner in the Surry County, North Carolina, jail while he was awaiting trial. This interview lasted about 90 minutes (T p 1106) and it appears to be the only time Dr. Humphrey and the petitioner spoke. During this time, petitioner told him about all the loss he had experienced during his life and about some suicidal feelings he had. (T pp 1107 and 1108) Humphrey noted that petitioner's life had been "chaotic." (T p 1107) From this interview, as well as from a review of other material about petitioner's background furnished by counsel, Dr. Humphrey concluded petitioner fit into that class of persons who killed persons close to them out of homicidal-suicidal urges produced by repeated losses over the years. He further concluded that this type of person "will not destroy a stranger, will not indiscriminately kill. They don't constitute a threat to the public. They constitute a threat to that which they fear losing most, the person closest to them." (T p 1109)

Dr. Humphrey's testimony was not relevant to mitigation. He never said that petitioner was not homicidal or that he would not kill again. All he said was that in the event petitioner did kill again, his victim would be someone who had established an intimate or family type relationship with him. Dr. Humphrey's testimony was that petitioner had all of the characteristics of a killer who would select as his victims those in an intimate relationship with him. This is hardly mitigating evidence; rather, it is evidence of the most damning type. It showed the petitioner to be exactly what the prosecution said he was; namely, a driven killer of those close to him. It showed him as a man who was and who would be unable to control his homicidal passions in the future if he should again be rejected by an intimate.

Further, as noted by the Supreme Court of North Carolina in its opinion, Dr. Humphrey's study was so seriously flawed so as to render the results almost meaningless. For example, there was no effort to make comparisons based upon the ages of the offenders; their sex; their educational level; their socio-economic background; their race or their intelligence level.

Such comparisons may well have shown differing casual relationships between types of crime and stress. There was no effort to compare the effects of similar stress on the population in general outside of the prison with the prison sample. As the State observed in its brief to the Supreme Court of North Carolina, it is common knowledge that everyone, at some point in life, is subjected to some, if not all, of the stressful events identified by Dr. Humphrey without becoming criminals, much less killers. Without an identification of those factors which make some persons succumb to these stresses so as to become killers, studies such as those conducted by Dr. Humphrey are meaningless for mitigation purposes.

To be relevant for purposes of mitigation, the sociological or psychological study must do more than identify the petitioner as a man who will kill those who form close relationships with him; rather, it must show that either he will not kill again or that his moral culpability for the present killing is such that he does not deserve the death penalty. The excluded testimony of Dr. Humphrey does not do this and Dr. Humphrey never claimed his studies could do this. All Dr. Humphrey could do was identify petitioner as one of a class of people who, because of stress, was driven to kill those close to him when they rejected him. Without more, it merely shows a weak, susceptible man who could not cope with the stresses of life and who was likely to kill anyone close to him who crossed him. A killer of those who place their trust in him is the most culpable of all since the trusting person is off his guard and unable to defend himself. Moreover, such conduct is both socially and morally reprehensible because it tends to place those who trust in the most vunerable position and thereby discourages trust which is the glue that holds society together. Actions which penalize the trusting relationship cannot be tolerated.

As the second part of its argument on this issue, the State reminds the Court, as the petitioner candidly admitted in his petition, that all of the life history of petitioner was before the sentencer through testimony of petitioner, his mother, his probation officer, his friends, a lawyer, his pastor and others. The exclusion of Dr. Humphrey's testimony did not keep a single fact concerning defendant's past history away from the jury. Moreover, the trial judge recapitulated this evidence extensively in his final instructions and repeatedly told the jury it might consider all this evidence. Thus, the problems presented by Lockett, where the statute prevented consideration of certain evidence, or Eddings where the sentencing judge refused to consider evidence about the accused's background, simply do not arise. Clearly, the sentencing jury had before it the entire sad history of petitioner. In the face of this mass of evidence, it could hardly be error, much less prejudicial error, to exclude Dr. Humphrey's testimony that petitioner would fit into that group of convicted people who kill those close to them. It could almost be said that this excluded evidence would have aided the prosecution more than the petitioner since it showed he had the perfect profile of a ruthless, driven secretive killer of those who had put their trust in him.

In conclusion, the State argues, as it has from the beginning, that this proffered evidence was not relevant on the issue of mitigation and that the petitioner's entire life history was fully developed through other evidence. Accordingly, no constitutional error has been shown in this aspect of the trial and, the State submits, this portion of Petitioner's Writ should be denied.

II

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT CONSTITUTIONALLY EXCUSED TWO PROSPECTIVE JURORS FOR CAUSE BASED UPON THE JUROR'S ANSWER CONCERNING THEIR VIEWS ON THE DEATH PENALTY.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), it was held that a prospective juror who states that under no circumstances he can render a verdict which would require the imposition of capital punishment may be constitutionally excused from sitting on a case where the death penalty may be one of the sentencing options. The reason for this rule is, quite simply, that this potential juror is biased to such an extent that he cannot consider one of the options which he is required to consider under the law.

One of two jurors excused for cause by the trial judge said, in response to questioning by the prosecutor and the trial judge, that he did think he could vote for the death penalty while the other said he could not and would not vote for the death penalty. Petitioner argues these answers and the jury selection procedure involving leading questions with the entire venire present were so equivocal and tainted as to violate the spirit if not the letter of Witherspoon.

The short answer to this is that prospective juror James Arrington's answers were not equivocal. (See Appendix H of the Petition) and that Garland Smith's answers, when taken in context, were equally positive. (Appendix G of the Petition) Petitioner fastens upon modes of expression to infer equivocation and he almost seems to argue that if the answer is not exactly in the words used by the author of Witherspoon it will be suspect. Such argument begs the point. The answers of both excluded jurors must be considered in context and their words construed in that context. When this is done, the unequivocal response of each person was that he could not impose the death penalty in this case. By this answer, he was shown to be biased and thus properly subject to challenge for cause.

CONCLUSION

The Petition for a Writ of Certiorari should be denied because the totally irrelevant evidence of Dr. Humphrey was properly excluded and because the two potential jurors, Smith and Arrington, were clearly and unequivocally opposed to the death penalty so as to be biased and properly excludable.

Respectfully submitted, this the 11th day of December, 1984.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of North Carolina, was served on the defendant, by and through his attorneys of record, by depositing said copy in the United States Mail with the addresses indicated below and with adequate postage thereon.

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No. 84-5819

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October Term, 1984

ARTHUR MARTIN BOYD, JR.

Petitioner,

-v-

THE STATE OF NORTH CROLINA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

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REPLY TO BRIEF IN OPPOSITION TO
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THE SUPREME COURT OF NORTH CAROLINA

Petitioner Arthur Martin Boyd, Jr., submits the following reply to Respondent's Brief in Opposition (BIO) to the Petition for a Writ of Certiorari:

Although couched as an argument that the excluded expert evidence proffered by Mr. Boyd in mitigation falls outside of Webster's definition of "relevant" (BIO at 2-3), the BIO implicitly recognizes that relevance cannot seriously be disputed here.[1/] For the question actually addressed in the BIO is not whether the excluded evidence "throw[s] any light" upon Mr. Boyd's character and propensities,[2/] but rather, as respondent puts it, how "much of an insight" that evidence provides. BIO at 4. Indeed, the BIO resembles nothing so much as a closing argument to a jury contending that admittedly relevant evidence is not convincing enough to require imposition of a sentence less than death.[3/]

1/ Eddings v. Oklahoma, 455 U.S. 104 (1982), clearly disposes of any relevance question, holding that evidence identical in scope, substance and detail to that proffered here is "particularly" "relevant mitigating evidence." Id. at 115. Accord, id. at 119 (O'Connor, J., concurring); id. at 125 (Burger, C.J., dissenting). See Petition at 11-16, 26-27.

2/ Under North Carolina law, "[e]vidence is relevant if it has any logical tendency to prove a fact at issue in a case, and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties ... [including] their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." State v. Arnold, 190 S.E.2d 423, 427 (N.C. 1973) (citations omitted) (emphasis added). Accord, e.g., Fed. R. Evid. 401.

3/ Respondent contends, for example, that Dr. Humphrey's opinions are "flawed" because: (a) he interviewed Mr. Boyd for "only" 90 minutes (but see Barefoot v. Estelle, ___ U.S. ___, 77 L.Ed.2d 1090, 1110-11 (1983), holding that conclusions like Dr. Humphrey's are admissible even when made without any personal examination of the defendant); (b) one of the studies on which Dr. Humphrey based his conclusions relied upon officially gathered data about hundreds of inmates rather than on personal interviews (but see App. E, 1113-14, 1118-20, where Dr. Humphrey explains that the information in the carefully cross-checked government records on which he relied provides a far more objective and methodologically sound basis for analysis than personal interviews); and (c) Dr. Humphrey, although prepared to predict confidently that Mr. Boyd "do[es]n't constitute a threat to the public," was not asked to and did not promise absolutely that Mr. Boyd "would not kill again" were he tomorrow returned to society and subjected to the same severe emotional stress that preceded this offense. BIO at 4.

On the last-mentioned issue, note the directly conflicting decision in People v. Carlson, 404 N.E.2d 233, 244-45 (Ill. 1980), discussed in Petition at 28 n. 51. Carlson clarifies what respondent obscures: The question is not whether domestic homicide offenders should be absolved of any punishment for their violent acts. Rather, the question is whether the "emotional trauma" peculiar to certain domestic situations (Godfrey v. Georgia, 446 U.S. 420, 443 (1980)) can mitigate the offender's responsibility sufficiently to justify foregoing his execution in favor of incarceration for life--away from the small class of "loved ones" who are the only persons even possibly placed "in harm's way" by offenders like petitioner and Carlson. App. E, 1109.

Respondent's assertion (BIO at 2) that "most" of the evidence proffered by Dr. Humphrey was before the jury in lay testimony is likewise a "weight" rather than "relevance" question, and in any event is factually inaccurate and legally beside the point. For none of Dr. Humphrey's expert conclusions, nor any of the social scientific data on which he based them, nor any objective or expert opinions at all were before the jury. See cases cited in Petition at 32 n. 56. Moreover, the prosecutors' penalty-phase closing statements, by conceding the basic facts presented by petitioner's lay witnesses, then repeatedly asking "so what," clearly recognized the relevance, indeed necessity, of some further, expert explanation of how those facts elucidated the defendant's character or diminished his responsibility for or the likelihood of his repeating the offense. Petition at 16-17 & n. 12.

Petitioner does not intend to make his own closing argument on the excluded evidence in response to the State's--although he submits that had his attorney been afforded that opportunity at trial, he could have made a far more compelling argument than respondent makes here that Dr. Humphrey's expert conclusions convincingly explain why Mr. Boyd's inordinately loss-laden childhood, as catalized by his severely depressive reaction to his girlfriend's rejection, sufficiently qualify both his degree of moral culpability for the offense and the likelihood that he will repeat it to warrant a penalty short of death.

The critical point is that neither this Court, nor the Supreme Court of North Carolina, nor any other appellate court is the proper forum for resolving competing arguments about the weight due mitigating evidence. Rather, as the Court held in Eddings v. Oklahoma, 455 U.S. 104 (1982), once it is determined that the excluded evidence proffered in mitigation is "relevant," a remand is required: "On remand," the sentencer "must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them." Id. at 115, 117 (emphasis added). Accord, id. at 119 (O'Connor, J., concurring); id. at 127-28 (Burger, C.J., dissenting); Barefoot v. Estelle, ___ U.S. ___, 77 L.Ed.2d 1090, 1109-10 (1983).

Because the evidence that the sentencing jury here was precluded from considering is identical to that deemed relevant and mitigating in Eddings (see n. 1, supra), the affirmance of Mr. Boyd's death sentence below cannot stand alongside the remand in Eddings.

The Court should grant certiorari to resolve this conflict.

Respectfully submitted,

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I hereby certify that I am a member of the bar of this Court and that I served the annexed Reply to Brief in Opposition to Petition for a Writ of Certiorari on respondent by placing copies in the United States mail, first class mail, postage prepaid, addressed as follows:

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Done this 20th day of December, 1984.

James S. Liebman
JAMES S. LIEBMAN

OPINION

SUPREME COURT OF THE UNITED STATES

ARTHUR MARTIN BOYD, JR. *v.* NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 84-5819. Decided April 15, 1985

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner was sentenced to death after a hearing in which the judge prevented the jury from considering evidence that it might well have considered highly relevant to petitioner's motive at the time of his crime and to the relationship of his character and record to the offense he had committed. As a result, the jury was called on to decide whether death was the appropriate punishment but was deprived of the evidence petitioner offered in mitigation of his crime. The death sentence must thus be vacated, for it stands in glaring conflict with one of the most basic requirements of the Eighth Amendment—"'that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978)).[1]

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[1] I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U.S. 153, 231 (1976) (MARSHALL, J., dissenting). But even if I did not take this view, I would grant review in this case because of the important issue raised concerning the proper interpretation of *Lockett* and *Eddings*.

Unfortunately, this case is illustrative of a disturbing trend in a number of state courts to read our holdings in *Eddings* and *Lockett* in an unjustifiably narrow manner, and to declare, in spite of these holdings, that an increasing number of proffered bases of mitigation are simply irrelevant. See, *Eutsy* v. *Florida*, *post*, p. —— (MARSHALL, J., dissenting from denial of certiorari); *Patterson* v. *South Carolina*, *post*, p. —— (MARSHALL, J., dissenting from denial of certiorari).

I

Petitioner Boyd was convicted of murdering his former girlfriend after unsuccessfully attempting a reconciliation. They had lived together for three years but had separated several months prior to the murder. On the day of the murder, Boyd met the victim at a local shopping mall. They sat and talked quietly for some time, sitting in the midst of a church-sponsored event run by the victim's father, a local pastor. Eventually, the victim's mother approached her daughter and said it was time to leave, but Boyd asked the daughter to stay and talk to him a little longer. After talking some more, the victim said she would leave. She was also reported to have said that if Boyd was going to kill her "he should hurry up and get it over with." Boyd took out a knife but also assured her that he would not hurt her. He then began to stab her rapidly and repeatedly until bystanders dragged the two apart. The victim died from the multiple stab wounds.

At his capital sentencing hearing, Boyd offered in mitigation expert testimony by a sociologist, Dr. Humphrey, who had interviewed Boyd and previously had done academic research into the behavioral dynamics of suicide and homicide. Most relevantly, Dr. Humphrey had co-authored a study of people who had murdered their relatives or intimates. The trial judge excluded the entirety of his testimony.

Dr. Humphrey would have testified, based on his study and his personal interview with Boyd, that Boyd's crime and life history conformed to a common pattern that distinguishes those who kill intimates from those who kill others. According to the sociologist, those in the former group are more likely to have had lives characterized by repeated deep personal losses (such as deaths of loved ones or abandonment by parents) and strong feelings of self-destruction:

> "'The more loss in someone's life, the more likely they are to become self-destructive. And it seems that killing a family member or killing a close friend is an act of self-destruction. They are after all, killing something that is a part of them, very close to them, very important to their self. They are destroying them. So in the act of killing another person they are in fact destroying part of their self, a selfdestructive act.'" 311 N. C. 408, 439, 319 S. E. 2d 189, 209 (1984) (Exum, J., dissenting) (quoting *voir dire* testimony of Dr. Humphrey).

In Dr. Humphrey's view, Boyd's life history conformed to the pattern he had found in his research; Boyd's life had involved repeated and intense personal losses that had generated strong self-destructive feelings in him.[1] Dr. Humphrey thus understood Boyd's crime "primarily [as] a depression caused self-destructive act, closely related to the impulse that leads to suicide, resulting from a life history of an inordinate number of losses beginning with the abandonment by the defendant's father and the death of his grandfather and culminating with the threatened loss of [the victim]." *Id.*, at 419, 319 S. E. 2d, at 197.

Boyd's counsel sought to introduce the expert's testimony to provide the jury with a perspective on Boyd's personal history, on his mental and emotional condition, and on how these factors may have led to the crime. In that sense, it was evidence of motive; but more broadly, the proposed testimony was an effort to "link together all of the defendant's mitigating evidence into a unified whole which explained the

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[1] Boyd's lawyers had introduced evidence that Boyd's father had been an alcoholic who abandoned his family when Boyd was a child, that his grandfather—who he had come to view as a father—had then died, that he had a history of losing jobs and repeated imprisonment, and that his life since adolescence had been characterized by drug and alcohol abuse. When Dr. Humphrey interviewed Boyd, Boyd said that he had so feared the loss of his girlfriend that he had contemplated suicide shortly before the murder.

apparent contradiction of killing the person the defendant loved the most." *Ibid.*[1]

On the prosecutor's motion, the trial court excluded Dr. Humphrey's explanation of why Boyd killed his former girlfriend, but the prosecutor nevertheless argued vigorously for an alternative explanation of Boyd's motive. According to the prosecutor, Boyd was selfish and mean; he killed the victim because if he could not have her he wanted to make sure that no one else could. *Id.*, at 426, 319 S. E. 2d, at 207 (Exum, J. dissenting). In the words of the dissenting opinion below, the State's theory was "a motive theory that is easy to sell in this kind of case. . . . Defendant's motive theory was different, less apparent to the average observer, and probably more difficult to sell. It was a theory which does not excuse the crime but which might have mitigated it in the eyes of the jury." *Ibid.* The legal question, obviously, is not which of these theories is more worthy of belief, but whether petitioner had a right to offer evidence in support of his theory. *Lockett* and *Eddings* leave no doubt as to the correct answer to that question; he had such a right.

With two justices in dissent, the State Supreme Court affirmed the sentence of death. In the Court's view the proffered testimony only "placed [the] various 'stresaful events' [of Boyd's life] in a context suggesting that defendant's act [of murder] was predictable." 311 N. C., at 423, 319 S. E. 2d, at 199. It had "merely constructed a profile of a murderer into which the defendant fits." *Ibid.* The Court doubted that this information could have much weight in mitigation, especially because, in the Court's view, some of the traumas in Boyd's life (*e. g.*, imprisonment) could not "extenuate or reduce the moral culpability of the killing." *Ibid.*

II

Lockett and *Eddings* have at their core an understanding that the factors that can rationally militate against the appro-

[1]The proffered evidence would of course also have been quite relevant to such issues as future dangerousness and prospects of rehabilitation.

priateness of death are varied, subjective, and not subject to prior itemization. See also *McGautha* v. *California*, 402 U. S. 183, 204–208 (1971). Moreover, those cases clearly stand for the proposition that, within a broad range of relevance, the weight of any offered factor of mitigation is for the sentencer to determine. Here the sentencers were the jurors. Although evidence of various events in Boyd's personal history was admitted, expert evidence that might have been highly useful to the sentencer's attempt to understand Boyd's crime and its relation to those events of personal history was excluded. Expert knowledge of human motivation might well have been considered highly relevant in the eyes of the jurors, for it might have offered an alternative explanation for why Boyd killed. Without that evidence, the scattered personal history evidence might have had little apparent significance, but the expert evidence might well have provided a link between the personal history evidence and that "extenuat[ion] or reduc[tion of] the moral culpability of the killing" that might call for a sentence of less than death. The exclusion of the expert evidence thus violated *Lockett* and *Eddings*.

Behind the State Supreme Court decision stand certain premises concerning punishment. Most apparently, the Court took the view that it would be highly questionable to mitigate punishment based on a criminal's conformity to a social psychology profile that traces the crime's origins to the traumas of the criminal's life and to the self-destructive impulses that those traumas may produce. But under the Constitution, the weight of mitigating factors is a judgment for the capital sentencer, and neither court nor legislature may usurp the sentencer's role. In a jury's eyes, the fact that a killer is moved by self-destructive tendencies might make a crime seem more generally tragic and less demanding of retribution, and it might make the criminal seem less clearly evil and more capable of rehabilitation. Moreover, the jury might become less concerned with the prospect of

future dangerousness where a defendant's violence stemmed from intimacy and the likely alternative to death is that he spend his life in prison far from loved ones.[4]

Although these possible uses of the proffered but excluded evidence show that it was of clear relevance within even the most traditional views of mitigation, its possible power with the jury is even clearer when we consider the inherent subjectivity of capital sentencing decisions. Put simply, viewing the defendant's behavior in terms of a pattern that has governed a far greater number of persons than the defendant alone might lead a jury to step beyond initial revulsion and attempt to understand the crime in more human terms. As one commentator has speculated, in many cases a jury's ability to take precisely that step might be what determines whether or not a defendant will be sentenced to die:

> "[It may be that] many jurors vote to execute when they are repelled by the defendant, because he presents the threatening image of gratuitous, disruptive violence that they cannot assimilate into any social or psychological categories they use in comprehending the world. Jurors can probably give mercy to even the most vicious killers if they can somehow understand what might cause this person to be a killer . . . . A juror votes to expel the defendant who presents an image of violence he or she cannot assimilate into any stabilizing categories, and who thereby threatens his or her sense of comfortable order in the world." Weisberg, Deregulating Death, 1983 S. Ct. Rev. 305, 391.

[4]There is some ambiguity in the State Supreme Court's opinion as to whether the affirmance rested on a view that the proffered evidence was properly excludable as irrelevant or was simply of so little weight as to not be a basis for vacating the sentence in this case. Either basis would of course be improper. The former would clearly be contrary to the discussions of relevance in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings*, v. *Oklahoma*, 455 U. S. 104 (1982), and the latter would ignore those cases' determination that the sentencer be the judge of the proper weight to be given to mitigating factors. Whatever might be the circumstances, if any, that might allow a court to speculate as to the possible harmlessness of an improper exclusion of a properly proffered mitigating factor, cf. *Eddings*, *supra*, at 119 (O'CONNOR, J., concurring); see also *Songer* v. *Wainwright*, 469 U. S. ——, —— (BRENNAN, J., dissenting from denial of certiorari), the standard can certainly be no less than the constitutional harmless error standard we have otherwise endorsed. The court below did not engage in any determination that there was error that could be found harmless beyond a reasonable doubt. See *Chapman* v. *California*, 386 U. S. 18 (1967). Moreover, there is no reason to believe that any such determination could reasonably have been made in a case such as this.

It was our recognition of the importance to a defendant of just this sort of subjective but intensely human analysis of mitigation that stood behind this Court in *Lockett* and *Eddings*. Relying on those cases, Boyd sought to place his crime within the jury's understanding. The State courts denied him the right to make that effort.

III

We have broadly declared that the law cannot preclude a capital sentencer's consideration of "'*any* aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings*, 455 U. S., at 110 (quoting *Lockett*, 438 U. S., at 604). Accordingly, a constitutional death sentence cannot result from a process wherein the State may portray a defendant's acts as so "inhuman," bizare, and cruel as to be beyond the reach of human sympathy, but a defendant is legally precluded from offering in mitigation those "'diverse frailties of humankind'" an understanding of which might place the barbaric act within the realm of the tragic but nonetheless human. 455 U. S., at 112, n. 7 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976)).

The *Lockett-Eddings* principle stems from the "'fundamental respect for humanity underlying the Eighth Amendment," *Eddings*, *supra*, at 112 (quoting *Woodson* v. *North Carolina*, *supra*, at 304), and rests on the requirement that "[a] jury must be allowed to consider on the basis of all rele-

vant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, 428 U. S. 262, 271 (1976). Without the *Lockett-Eddings* principle, the uniqueness of a person's life, including how that life may have led to the crime, may be casually ignored in determining whether that person should live or die. The Constitution cannot tolerate the execution of people "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson* v. *North Carolina*, *supra*, at 304. This Court should not stand by and allow the *Lockett-Eddings* principle to erode. I would thus grant review, and I dissent from the denial of certiorari.